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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 48

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OFFICERS
OF THE
SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

FRANK A. MOORE - - - CHIEF JUSTICE
CHARLES E. WOLVERTON - ASSOCIATE JUSTICE
ROBERT S. BEAN - - - ASSOCIATE JUSTICE

ANDREW M. CRAWFORD - ATTORNEY-GENERAL
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ARTHUR S. BENSON - - DEPUTY AT SALEM
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ERRATA.

On page 186, line 3 from the bottom, the last word should be "premeditation."
On page 489, in the last line of headnote 2, the word "may" should be "cannot."

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

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Argued 30 March, decided 20 April, 1908.

FINNEY v. EGAN.

[72 Pac. 136.]

ACTION—EFFECT OF EQUITABLE CROSS-BILL AND DECREE THEREON.

Under B. & C. Comp. § 591, providing that in an action at law, where defendant is entitled to equitable relief, he may, on answering, file a complaint in equity, which shall stay the proceedings at law, and the case shall thereafter proceed as in equity, when such proceedings may be enjoined or allowed to proceed, the equity court does not obtain jurisdiction over the original action, but it remains simply in abeyance until the equity suit is decided, when it is either enjoined or released, and as to this latter alternative, the absence of a restraining clause in the decree is practically a permission to continue the original proceeding at law.

From Marion: **GEORGE H. BURNETT**, Judge.

This is an action by James Finney against William H. Egan to recover the possession of certain real property and damages for its detention. The complaint, in effect, alleges that plaintiff is the owner in fee simple and entitled to the immediate possession of the following described premises: Commencing at a stone set at the southeast corner of the donation land claim of John Albright in township 6 south of range 2, west of the Willamette Meridian, said point being at the eastern terminus of an old fence; thence north 31 links, more or less, to a new fence built by the defendant; thence north, 78 degrees west, along

the line of said new fence, 23.45 chains; thence south, 12 degrees west, 31 links, more or less, to the line of said old fence; and thence south, 78 degrees east, along the line of said old fence, 23.51 chains, more or less, to the place of beginning; that defendant unlawfully entered said premises, ousted plaintiff therefrom, trampled and injured the growing grain, and threw down the fence thereon, to plaintiff's special damage in the sum of \$150; and that he wrongfully withholds the possession thereof, to his damage in the sum of \$100. The defendant, having filed an answer alleging that he was entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, thereupon, as plaintiff, filed a complaint in equity in the nature of a cross-bill, averring the facts constituting his alleged right to the premises in controversy, and praying that the plaintiff herein might be enjoined from asserting any right thereto until this suit could be tried. Issue having been joined on the cross-bill, a trial was had, resulting in a decree fixing the line of the old fence as a boundary between Finney's and Egan's lands, and perpetually enjoining the latter from asserting any claim to said premises. The plaintiff herein, insisting that the suit in equity had not determined the question of damages to which he was entitled as a consequence of the alleged trespass, resumed the prosecution of this action, securing a judgment therein in the sum of \$20, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *William H. Holmes*, *Webster Holmes*, and *William M. Kaiser*, with an oral argument by *Mr. W. H. Holmes* and *Mr. Kaiser*.

For respondent there was a brief and an oral argument by *Mr. Peter H. D'Arcy*, *Mr. John A. Carson*, and *Mr. Geo. G. Bingham*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion of the court.

It is contended by defendant's counsel that by the interposition of the cross-bill the court secured jurisdiction of the subject-matter, and, having determined the controversy in the suit in favor of the plaintiff, had authority to determine what damages, if any, he sustained, and, not having done so, an error was committed by the court in permitting plaintiff to resume the prosecution of the action at law after the decree was rendered. The statute authorizing the procedure adopted to stay the trial of this action is, as far as deemed material, as follows: "In an action at law, where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material for his defense, he may, upon filing his answer therein, also as plaintiff, file a complaint in equity, in the nature of a cross-bill, which shall stay the proceedings at law, and the case thereafter shall proceed as in a suit in equity, in which said proceedings may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree": B. & C. Comp. § 391. The final decree did not enjoin further proceedings in the action at law, nor did it, in express terms, allow the action to proceed in accordance therewith. The damage Finney sustained by Egan's alleged removal of the fence, and the injury to the grain growing on the disputed premises was not in issue in the suit in equity, and hence no decree could have been rendered therein in relation to such damage, except to allow the action at law for the recovery thereof to be prosecuted for that purpose. The decree having been in Finney's favor, the failure to enjoin further prosecution of the action at law was, in our opinion, tantamount to an authorization to proceed to final determination therein for the recovery of damages for the injury sustained. Though the prosecution of the action

at law was stayed by the filing of the cross-bill, the court, in exercising its equitable jurisdiction, did not, under our system of procedure, thereby secure jurisdiction of the action, which remained in abeyance until the final decree was rendered: *Hill v. Cooper*, 6 Or. 181; *Oatman v. Epps*, 15 Or. 437 (15 Pac. 709). When the suit was terminated without any restriction in the final decree, the suspension of the action at law was necessarily ended, thus allowing the trial of the action to proceed to final determination of the remaining questions involved therein.

Believing that the court was authorized to try such issue, its judgment thereon is affirmed. AFFIRMED.

Argued 21 April, decided 1 May, 1908.

SCHLEIGER v. NORTHERN TERMINAL CO.

[72 Pac. 324.]

RIGHT OF ACTION BY PARENT FOR WRONGFUL DEATH OF MINOR.

1. The right of action for causing the death of a minor child, conferred by Section 34, B. & C. Comp., on the parents of the deceased, is not exclusive of the right of the personal representative of a deceased minor to sue for causing the death under section 381: *Putman v. Southern Pac. Co.* 21 Or. 230, 239, distinguished.

EVIDENCE OF CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

2. The evidence in this case on behalf of plaintiff was sufficient to carry the case to the jury on the question of negligence, and its weight is exclusively for the jury's consideration.

NEGLIGENCE—CARE REQUIRED OF CHILDREN—QUESTION FOR JURY.

3. Children of tender years are not held to the same degree of care in avoiding danger as adults, and whether a young child was guilty of contributory negligence in a given case is a proper question for the jury to decide, having in mind the age and development of the child and the conditions surrounding the occurrence: *Blackburn v. Southern Pac. Co.* 34 Or. 215, distinguished.

ACCIDENT AT CROSSING—INSTRUCTION AS TO NEGLIGENCE OF COMPANY.

4. When cars are being backed along or across a public street frequented by pedestrians, and the engineer is so situated that he cannot always see the track and adjacent space, it is the duty of the railroad company to provide a lookout man, either on the front of the nearest approaching car or at the crossing, to give warnings, and a failure so to do is negligence.

From Multnomah: ARTHUR L. FRAZER, Judge.

George Schleiger, as administrator, recovered a judgment of \$1,225 against the Northern Pacific Terminal Company, from which the defendant appeals.

AFFIRMED.

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For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief and an oral argument by *Mr. Wilson T. Hume*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an action instituted by George Schleiger, as administrator of the estate of his deceased son, Fred Schleiger, against the Northern Pacific Terminal Company, to recover damages resulting from the death of his said son, a minor of the age of eleven years, which it is alleged was caused by the negligence of the servants and employes of the defendant company. The defendant maintains several railroad tracks, used for switching purposes, crossing Eighth Street, in the City of Portland, near its junction with Front Street, which it approaches obliquely at an approximate angle of forty-five degrees from the southwest; and, extended across the latter street, it forms a continuous passageway to the westerly end of the approach to the Albina Ferry. At the time of the accident, the company's employes, consisting of an engineer and fireman, with the assistance of a brakeman, were engaged with engine No. 5, in switching some cars upon switch tracks Nos. 15 and 16, both of which cross Eighth Street very near its north end. They had just switched a car (possibly two or three) upon track No. 15, and pulled the train, then consisting of seven box cars, and one flat car, past No. 16, with a view of backing again upon that track, when it was observed that the ferry was making a landing with a number of passengers from Albina, whereupon the train was halted for a time (two minutes or more, perhaps), and then, at the signal of the brakeman, it was moved back upon switch No. 16; and while the end cars were crossing Eighth Street, moving slowly (at the rate

of three or four miles an hour), the decedent received the injury which resulted in his death. Herman Jessman, a boy a little larger than the deceased, and about the same age, was with him at the time, but escaped unhurt. The cars were from thirty-four to fifty feet in length, and switch No. 16 is situated some thirty or forty feet north of the street crossing. By reason of a curve in the track, and the cars obstructing his view, the fireman could not see the crossing, but the engineer was in full view of it.

John McCarty testified that he crossed on the ferry; that he first saw the two boys thereon or near it; that he passed off and upon Eighth Street, and, when fifteen yards or so beyond the track, his attention was attracted to the train of cars backing up across the street; that he saw the boys stepping upon the track three or four feet in front of the car; that, apprehending the danger, he at once threw up his hands and shouted to the brakeman, who was then on the west side of the train, two or three cars from the engine; that the car struck the boys, and he ran back, and when the train came to a standstill the brakeman took this boy out; that the other was unhurt; and that when he first crossed the track he saw no one there to signal the train, or to give warning to passengers of its approach. Herman Jessman testified that he and Fred were going up on the south side of the street to the depot; that Fred was walking to the north of him, and a few steps behind; that he happened to look up, and saw the car, and tried to get out the best way he could; that the car hit him on the side, and knocked him out, off the track, a little way from the wheel on the side away from the ferry; that when he got up he saw Fred in the middle of the track, and the cars had not then stopped moving; that he heard no bell ringing and saw no brakeman when he came near the track, but that he heard some one call to him. On cross-examination he testified that he was talk-

ing to Fred at the time; that he did not see or hear the car before he stepped on the track; that he happened to look up, and saw the car, and tried to get out the best way he could; that no switchman was in sight; that both were walking with their heads down, which was the reason he could not see the car, and if he had looked north he could have seen it coming, and so could Fred. A. Tautfest testified that at the time of the accident he was driving a team on Eighth Street, intending to cross on the ferry; that just as he approached the track he was stopped by the train coming; that as he stopped he saw some boys come along on the south side of the street, who tried to get across the track, and were caught by the train and run over; that he did not hear any bell ring or see any brakeman or switchman anywhere near where he was in the street; that he saw what he supposed was a brakeman forty or fifty yards from them; that the cars were moving about as fast as a man could walk, and almost without any noise.

Upon the part of the defendant we may say, generally, that the evidence adduced by it tended to show that its agents and employes were at the time exercising due care and precaution in the management of the train with reference to the crossing, and the danger of accident incident thereto; that the train was stopped on purpose to allow the passengers from the ferry to cross the track; that when all had crossed, so far as could be seen, the brakeman, who was then standing just north of the street, signaled the engineer to back up the train; that he walked on south, and as he did so the cars went by slowly; that when he got nearly to the south sidewalk he heard some one exclaim, "O, my God!" and that he turned and gave the engineer a signal, which brought the train to a sudden stop; that just before it came to a standstill he saw a boy come out from between the first and second cars, and

another—the one injured—underneath the second car. In this the brakeman is more or less corroborated by the engineer and fireman on engine No. 5, the fireman on engine No. 2, and the assistant yard master. It is further shown that the bell on the engine was ringing automatically, and that it was the brakeman's duty to be at the end of the train when crossing the street, to keep a lookout for persons passing thereon, as well as to signal for the movement of the train.

There was a motion for nonsuit when the parties rested, which being overruled by the court, the jury returned a verdict for the plaintiff, and, judgment having been entered thereon, the defendant appeals.

1. The first contention of counsel for defendant is that, as the statute of this state gives a right of action to the father, or, in case of his death or his desertion of his family, to the mother, for the injury or death of a child (B. & C. Comp. § 34), it precludes any right of action by personal representatives for damages arising out of the same casualty. So he concludes that the present action is without warrant of law. By Section 379, B. & C. Comp., it is provided that a cause of action arising out of an injury to the person dies with the person of either party, except as provided in section 381, but that the provisions of chapter 6, relating to "Actions by and against Executors or Administrators," in which the section is contained, shall not be construed so as to defeat or prejudice the right of action given by section 34, c. 3, relating to "Parties to Actions." Section 381 gives a right of action to the personal representatives of a deceased person whose death is caused by the wrongful act or omission of another, if the deceased might have maintained an action, had he lived, for an injury done by the same act or omission; and the damages recoverable, not to exceed \$5,000, are required to be administered as other personal property of the decedent. All these sections were

adopted in 1862, and are a part of the act "to provide a Code of Civil Procedure," and naturally were intended to subserve a harmonious purpose, without impinging one upon the other. This purpose, so far as is necessary for a decision in this case, has been illustrated to some extent in former decisions of this court. It is settled that the right of action given by section 34 to the father for the injury or death of a child is limited in its scope of operation to the minority of such child; that is to say, that the term "child" is used as indicative of a minor, and not with reference to one who has attained to the age of majority (*Craft v. Northern Pac. R. Co.* 25 Or. 275, 35 Pac. 250); and further, that the right of action given by section 381 in favor of the personal representative is a new right, not arising from survivorship of any action the decedent may have had, but founded upon his death, without relation to the injury from which it resulted: *Perham v. Portland Elec. Co.* 33 Or. 451 (53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730). The personal representative sues in right of the estate to recover the loss or damages, if any, it may have sustained on account of the death of the decedent; and this is measured, as nearly as the application of human experience and skill can form an estimate, by the value of the life lost, not to exceed \$5,000; and neither compensation for the pain or suffering of the deceased, nor *solatium* for wounded feelings or mental suffering by him or surviving relatives, is regarded as an element attending the cause of action, or constituting any part of the measure of damages sustained: *Carlson v. Oregon S. L. Ry. Co.* 21 Or. 450 (28 Pac. 497). We need not go further to ascertain the purpose of this latter section, or to determine the nature of the right of action given therefor, and the question is resolved to this: Does the right of action exist by virtue thereof for the death of a minor child, having a father, mother, or guardian? At common law, the

parent was entitled to maintain an action for an injury to the child—the right thereof being founded, not upon the parental relation, but upon the technical relation of master and servant—and the compensation or damages recoverable was measured by the pecuniary loss sustained by the parent, resulting from the injury to the child: 21 Am. & Eng. Ency. Law (2 ed.), 1044; *Sawyer v. Sauer*, 10 Kan. 519. When, however, death resulted from the injury, the right of recovery was limited to the pecuniary loss sustained by the parent on account thereof in the interim between the time of the casualty and the death. There was no right of action in the parent, either for its death, or for any loss or damages occasioned or resulting to it therefrom. Indeed, it was a principle of the law that no civil action was maintainable for a right springing from the death of a human being: *Davis v. St. Louis, I. M. & S. Ry. Co.* 53 Ark. 117, 127 (13 S. W. 801, 7 L. R. A. 283).

Furthermore, no action for personal injuries survived, and our statute upon the subject (B. & C. Comp. § 379) is but declaratory of the common law. Section 34 therefore gives a right of action to the parent that was not maintainable at common law, unless it was confined to the injury of the child culminating in his pecuniary loss or damages in the interim between the time of the disabling injury and its death, which did not lapse with the death of the child. Neither is it a survival statute. It revives no right of action that the deceased could have maintained, but continues in part a right the parent formerly possessed, and in part affords him a remedy entirely new; and, where death ensues from the injury, the two are merged, and the amount of recovery is measured by the pecuniary loss sustained by the parent or guardian by reason of both the injury and death: *Pennsylvania Co. v. Lilly*, 73 Ind. 252. This seems to us to be the most reasonable interpretation of the statute, considering the

law as it originally stood, and the evil sought to be mitigated. The damages recovered inure solely to the benefit of the father, mother, or guardian, as the case may be, and cannot be considered, under any principal of right and justice, as a part of the estate of the decedent. It is incompatible with the minor's condition that his earnings should inure to his personal benefit, or that of his estate, while he is in the service of his parent or guardian. They belong to the parent, and pass to his estate, not to that of the child. If, therefore, the child's death ensues through the wrongful act of another while occupying that relation, the parent may sustain a pecuniary loss by reason of being deprived of his services, and perhaps in some other form, peculiarly his own, and entirely distinct from any that may have been sustained by the minor or his estate in the event of his death. In this view, there is no inharmony or repugnancy between sections 34 and 381. One gives a right of action to the father, mother, or guardian, as the case may be, for pecuniary loss that he or she has sustained by reason of the injury or death of the minor child, and the other for such as the estate has sustained by his death. The one ends where the other begins. The estate could not be injured while the minor child would be supposed to continue in the service of the parent, and, upon the other hand, the parent could not be injured when the child is relieved of the duty of rendering service to him, or has attained the age of majority. It is not anomalous that two actions should spring from the same wrongful act. Injuries of different nature to different persons may thus be inflicted, and actions may be prosecuted and damages given according to the nature of the right and principles involved. We are borne out in this conclusion by *Walters v. Chicago, etc. R. Co.* 36 Iowa, 458, and *Hedrick v. Ilwaco R. & N. Co.* 4 Wash. 400 (30 Pac. 714)—cases of nearly parallel significance with the one

at bar. See, also, *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137 (77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579); *Hulbert v. City of Topeka* (C. C.), 34 Fed. 510; *Davis v. St. Louis, I. M. & S. Ry. Co.* 53 Ark. 117 (7 L. R. A. 283, 13 S. W. 801); *Hurst v. Detroit City Ry.* 84 Mich. 539 (48 N. W. 44); and *Bradley, Adm'r v. Andrews*, 51 Vt. 525— which are in marked analogy.

Counsel relies strongly upon the opinion of Mr. Justice LORD, in *Putman v. Southern Pac. Co.* 21 Or. 230, 239 (27 Pac. 1033), wherein he says (depending mainly upon the case of *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793): "Under age, and when the child is in the service of his parent, there is no right of action under section 371 (B. & C. Comp. § 381) for its death, but under section 34, and the damages recoverable are for the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. * * But when the relation of parent and child continues after majority, the parent receiving support or service may maintain his action under section 34, notwithstanding the administrator may prosecute his action under section 371, and the damages recoverable are the reasonable expectations of pecuniary advantage or prospect of support from the continuance of the relation if his life had been spared." But this expression of the learned justice cannot be considered to be the law of the case. Nor is it clear that even he adhered to it when the case was finally disposed of on a rehearing. There was a divided court, one of the justices being unable to sit, and the case was affirmed by reason thereof. As explicitly stated in the opinion on rehearing, the division arose over the interpretation of section 34; it being suggested that the right of action of the parent was confined to the minority of the child. This suggestion has since been held to be its proper construc-

tion: *Craft v. Northern Pac. R. Co.* 25 Or. 275 (35 Pac. 250). The case therefore lacks the essentials of a precedent for our guidance. Besides, the different construction placed upon similar statutes by the Supreme Court of Indiana, in *Mayhew v. Burns*, 103 Ind. 328 (2 N. E. 793), cited in Mr. Justice LORD's opinion, is only adhered to by that court upon the principle of *stare decisis*, as may be inferred from a later case: *Berry, Adm'r v. Louisville, E. & St. L. R. Co.* 128 Ind. 484 (28 N. E. 182). Before dismissing the subject, it should be stated that we have not attempted by anything that has been said to state any rule for the measure of damages under section 34, as it is not called for at this time.

2. On the motion for nonsuit the defendant insists that no negligence was shown upon its part, and that, upon the other hand, it was shown that plaintiff's intestate was guilty of contributory negligence. Negligence and contributory negligence are more or less relative in their significance and application. What would be negligence upon the part of a railroad company under certain conditions may not be under others, and what would be contributory negligence in one person might not amount to such in another. The Terminal Company in the present instance was operating its engine with a train of cars upon its tracks for switching purposes. Eighth Street, across which its tracks were laid, and upon which it was operating its train, was a public thoroughfare, much used by pedestrians and persons with teams crossing to and fro upon the Albina Ferry, which makes regular trips at intervals of fifteen minutes. At the time of the accident, witnesses estimate that from twenty to sixty persons landed from the ferryboat, most of whom passed out upon Eighth Street—thus indicating, in a measure, that many persons frequented the thoroughfare; and of this the defendant does not disavow knowledge. It was therefore

required to use such care and foresight to prevent accident or casualty or injury to those in the rightful use of the street as a prudent and cautious person would under the exigencies of the case. Now, plaintiff's evidence tends to show that the defendant had no brakeman upon the end car, or other lookout at the crossing, to ascertain or discover the presence of persons thereat, or to warn them of danger. Such would have been an act of reasonable precaution under the attending conditions. The duty could not safely be left to the engineer or fireman upon the engine, who were between three and four hundred feet away, sometimes in a position to see the crossing, and at other times not, especially when the thoroughfare across which the defendant was engaged in backing its train was constantly in use by the general public, and sometimes in large numbers, and of all ages. If the testimony establishes the facts that it tends to prove—and that is a matter for the jury—then has the defendant been shown to be negligent, for it was without a brakeman or other person upon the end car, or a lookout at the crossing, to observe the approach of persons and to warn them of the danger. It is true, the defendant adduces proofs tending to show due care and proper precaution in the premises; but this only gives rise to a dispute upon a question of fact, and is by no means so clear and convincing that there could be but one opinion regarding the effect of the testimony.

3. Ordinarily an adult, with his powers of intellect and understanding unimpaired, when he approaches a railroad crossing is required to look and observe for himself, or, if the situation is such that he is unable to see, then to listen, and thereby to determine as to the approach of the train, and by so doing avoid the danger of accident: *Durbin v. Oregon R. & Nav. Co.* 17 Or. 5 (17 Pac. 5, 11 Am. St. Rep. 778); *McBride v. Northern Pac. R. Co.* 19 Or.

64 (23 Pac. 814); *Blackburn v. Southern Pac. Co.* 34 Or. 215 (12 Am. & Eng. R. R. Cas. (N. S.) 461, 55 Pac. 225). But the law does not require so much of a child of tender years. It cannot be expected to deport itself with equal prudence and foresight, as its faculties have not yet matured, and its apprehension of danger and the means of avoiding it are not so acute or accurate. As it advances in years, the law imposes care and foresight in proportion as its understanding develops, until full responsibility attaches. So it is considered to be an appropriate question for the jury to determine whether a child of tender years, in attempting to cross a railroad track, has acted with that degree of prudence and circumspection that would be expected of it, considering its age and capacity. It is not the usual question attending the act of an adult under like circumstances, but whether the child has exercised that care and precaution that children of that age are wont to exercise generally, and thereby looking from that viewpoint to determine whether it has negligently put itself into a position of danger. Whatever is beyond the ordinary judgment and discretion of a child of usual intelligence and understanding, having regard for its age, cannot, within the bounds of reason, be required of him, and consequently his failure to come up to such a standard cannot be treated as a neglect of duty: *Wallace v. Suburban Ry. Co.* 26 Or. 174 (37 Pac. 477, 25 L. R. A. 663); *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *Cooper v. Lake Shore & M. S. Ry. Co.* 66 Mich. 261 (33 N. W. 306, 11 Am. St. Rep. 482); *Wright v. Detroit, G. H. & M. Ry. Co.* 77 Mich. 123 (43 N. W. 765); *Lehman v. Eureka Iron & S. Works*, 114 Mich. 260 (72 N. W. 183); *McGovern v. New York Cent. & H. R. R. Co.* 67 N. Y. 417; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289 (44 Am. Rep. 377); *Kentucky Cent. Ry. Co. v. Smith*, 93 Ky. 449 (20 S. W. 392, 18 L. R. A. 63). The intestate and his companion walked

immediately in front of this moving car, and, at first blush, it would look as if they were inexcusably nonobservant and heedless. But it is very apparent that neither of them saw the car in time to avoid the danger, for as soon as they became aware of its proximity there was an effort to escape from the peril. Whether they should have seen it is quite another thing. The bell on the engine was evidently ringing, but its distance from the furthest car as it was crossing Eighth Street was so considerable (and it is in evidence that otherwise the train was moving obliquely toward the crossing, with but little noise) that, unless a person is charged with the absolute duty of looking and listening when about to cross the tracks of the Terminal Company, it may, within the bounds of reasonable inference, have happened that the intestate and his companion found themselves in their perilous position without negligence, viewed from the standpoint of their ages and experience. The question was one, therefore, proper to be submitted to the jury as one of fact, for their determination, and the motion for a nonsuit was rightly disposed of by the trial court.

4. The remaining exceptions involve two instructions of the court to the jury, as follows:

(1) "Where the engine is at the rear of a train, it is the duty of the company to either put a man as a lookout on the forward car, or else to station a man at the crossing for the purpose of giving warning, and the failure to do one of these two would constitute negligence.

(2) "Or if you find that, although the bell was rung, that they had no lookout, either on the forward car, or at or near the crossing, to warn pedestrians on the street that the train was coming, it was, in that event, guilty of negligence."

Defendant's counsel insists that the court should, under proper directions, have left it to the jury to say whether the company, under all the circumstances, should have

put a man as a lookout on the forward car, or have stationed one at the crossing, for the purpose of giving notice to persons upon the street, or, in other words, whether it was negligence on its part in not observing such precautions. The answer has already been suggested. Eighth Street, where defendant's terminal tracks cross it, is very much used by persons of all ages—being a public thoroughfare used in connection with the ferry, where large numbers of persons are crossing at intervals of fifteen minutes—and the train which was then being handled was of such length that the court could very well say, as a matter of law, that it was the defendant's duty to take the precaution suggested by the instructions complained of, leaving it for the jury to say, as it did, whether they were observed. An instruction of similar import, given under like conditions, was sustained in *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 654 (44 N. W. 849), and seems to be supported by authority, as well as upon reason and principle. See *Townley v. Chicago, M. & St. P. Ry. Co.* 53 Wis. 626 (11 N. W. 55); *Heddles v. Chicago & N. W. R. Co.* 74 Wis. 239 (42 N. W. 237); *Chicago, M. & St. P. Ry. Co. v. McArthur*, 53 Fed. 464 (3 C. C. A. 594); *Savannah, etc. R. Co. v. Shearer, Adm'x*, 58 Ala. 672. The judgment of the trial court will therefore be affirmed, and it is so ordered.

AFFIRMED.

Decided 3 November, 1902.

STATE v. DEAL.

[70 Pac. 534.]

CRIMINAL LAW — CROSS-EXAMINATION OF ACCUSED.

1. On trial for larceny of a horse it was error to ask the accused on cross-examination, for purposes of impeachment, questions as to his testimony at another trial for the larceny of a horse, he not having testified to anything with which the statements sought to be shown would be in any wise inconsistent.

HARMLESS ERROR — ADMISSIONS AGAINST INTEREST.

2. Error in permitting accused to be asked on cross-examination, for purposes of impeachment, as to matters which he had not testified to in chief, was harmless error where the testimony was admissible as declarations against interest, and refuted defendant's plea of former conviction for the same offense.

43 Or.—2.

INSTRUCTIONS SHOULD BE BASED ON ALL THE EVIDENCE.

3. A judge may properly refuse to give requested instructions that ignore part of the testimony.

INSTRUCTION ON FORMER ACQUITTAL—IMMATERIAL MISSTATEMENT.

4. An instruction that, if the horse for the larceny of which he was prosecuted was the same animal for the larceny of which he was formerly convicted, the conviction was a bar to the prosecution, and the verdict should be for defendant on the issue of former conviction, but, if the prosecution in this case was for a different horse, then the verdict on such issue should be for the state, is a correct and compact statement of the law; and the fact that the instruction improperly referred to the horse for the larceny of which the accused was formerly convicted as a brown horse was not reversible error where the color of the horse had no bearing on the question of identity.

EFFECT OF ADMISSIONS OF COMPLAINING WITNESS.

5. On a prosecution for the larceny of a horse, evidence of the admissions of the complaining witness that the horse was the property of defendant, made several days after the time defendant claimed to have obtained the horse from the witness in a trade, is inadmissible, except for impeachment after proper foundation therefor having been laid, for the witness is not in any legal sense a party to the record, so that his admissions are not binding on the state.

From Union : ROBERT EAKIN, Judge.

Defendant R. W. Deal was tried upon an indictment for the crime of larceny of a gelding, and, being convicted, appeals from the judgment ensuing. He interposed two pleas, viz., not guilty, and former conviction for the same offense. The state, in support of the charge, introduced evidence tending to show that in 1901 Charles Rowland was the owner of a certain brown or dark bay gelding, four years old, branded J D on the left shoulder, then being at Evans' livery stable; that he owned it since it was a suckling colt; that in September, 1901, the defendant drove the animal to and corralled it in the old town of La Grande, in Union County, Oregon, a few blocks from where Rowland was living, and on the same day sold it to one McDonald. Rowland testified that he never sold or traded the animal to Deal or any one else, and was still the owner thereof. When the state rested, the defendant took the stand in his own behalf, and testified that he saw the horse, for the larceny of which he was then being tried, in Evans' livery stable on the day previous, and that it was the same horse he turned over to McDonald, that the animal was his property, and that he obtained it from

Rowland about the eighteenth or twentieth of March last ; that he traded Rowland two horses for four, and this was one of the four ; that he found the horse in Campbell's field, and that on the seventh or eighth day of April he had a conversation with Rowland about the horses, relating it. This is, in substance, all the defendant testified to in chief. Having been excused, and again called in his own behalf, the prosecution, by leave of the court, asked him, in effect, if he did not testify at the trial of the case of *State v. Deal*, on October 11, 1901, that the horse mentioned in the indictment was one of the J D horses,—the one that had a leader cut on the left knee, which was calloused, the same being the horse brought from Pendleton, and one of the horses that he got in the trade with Rowland. The question was objected to as incompetent, irrelevant, not cross-examination, and not proper for impeachment ; but, being overruled, he answered that he made no such statement. The examination was, over objections, then continued as follows: "Q. Did you state which one of these horses was mentioned in the indictment in the former trial? A. Yes. Q. Which one of these horses did you testify that you was indicted for in the other trial? A. The one that has the cut knee. Q. And that was the horse that you brought—that you took—to Pendleton, and that Charles Rowland brought back from Pendleton ; was the horse described in the indictment in the former trial, is what you understood it? A. The horse with the cut leader is the horse that I understood was in the former case. That is the way I understood it. That was what they called the Masterson horse. Q. Just answer the question yes or no, will you please? A. Yes, that is the horse. That is the horse I understood was in the other trial." In rebuttal, and for the purpose of contradicting Deal, the state was permitted, also over objection, to show by the court reporter that he had testified at the trial of October 11th in substance as

indicated by the question first propounded by the state.

In this connection it should be further stated that the defendant, in support of his plea of former conviction, introduced in evidence the judgment roll in the case tried October 11, 1901, showing his conviction of the crime of larceny of a gelding, the property of Charles Rowland, and, to show that the animal therein involved was the same as he is here charged with stealing, introduced in evidence a portion of the testimony of Charles Rowland, in substance that he (Rowland) learned that the horse was in Campbell's pasture, and went over to get it; then heard it was in Pendleton; that he could not tell who had it in Campbell's pasture, and could not say exactly how old it was; that he obtained it from Masterson's boy when it was a yearling, and had it about four years; and that he did not get two horses from Masterson. Also a portion of his own, showing that the animal he obtained at Campbell's was the dark bay horse that Rowland had purchased from Masterson, and that was four years old the preceding spring. The state caused to be read other testimony, showing that Rowland stated at the former trial that the Masterson horse, for the larceny of which defendant was then on trial, was branded J D on the left shoulder, had one white foot, and a blemish on one knee, caused by a wire cut, and that this was the horse that defendant had in the Campbell pasture in the spring of 1901.

AFFIRMED.

For appellant there was a brief over the names of *Thos. H. Crawford* and *Ivanhoe & Cherry*, with an oral argument by *Mr. Crawford*.

For the state there was a brief over the name of *D. R. N. Blackburn*, Attorney General, with an oral argument by *Mr. Blackburn* and *Mr. Samuel White*, District Attorney.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The first question presented for our consideration is whether the trial court was in error in permitting the state to cross-examine the defendant, while a witness in his own behalf, touching what he may have testified to in his examination in a case wherein he was tried for larceny of a gelding at the preceding October term of the court, and, if so, whether the error was injurious or harmless in view of the whole record. The form of the question propounded by the prosecution would seem to indicate that it was for the purpose of impeaching the defendant as a witness in his own behalf, and thereby discrediting his testimony. At that stage of the proceeding the defendant had offered no proof in support of his plea of *autrefois convict*, although the record does show that the state had called several witnesses to prove that the horse Deal was then being tried for stealing was not the one involved in his trial at the preceding October term; so that it was in anticipation of the proof which it was supposed the defendant would make under his plea that the state sought to draw from him what he had testified to at the former trial in the particulars alluded to, and was irregular in any event. If impeachment was intended, the method invoked could only be permitted when it was sought to show that he had at other times made statements inconsistent with his present testimony: Hill's Ann. Laws, § 841. He had then testified to nothing with which the statement sought to be shown would in any wise be inconsistent. It related to an entirely different subject from any that he had spoken of while being examined in chief; so that it was not proper matter for his impeachment at that, or, as the record shows, at any other, stage in the trial. This is suggestive of a more substantial reason why the defendant, as a witness in his own behalf, should not have been required to

answer. The question propounded was not cross-examination upon any fact to which he had testified in chief: *State v. Saunders*, 14 Or. 300 (12 Pac. 441).

2. But, notwithstanding there was undoubted error in the admission of the testimony as offered, counsel for the state insist that it was legitimately admissible, because consisting of admissions and declarations against the interest of the defendant and in derogation of his plea of former conviction, and that, therefore, it was harmless. It was concededly admissible for this purpose. The method pursued was practically fruitless as a means of impeaching the defendant's credibility, as his further examination by the state's attorney, although improper, shows. Notwithstanding the defendant answered in a general way that he did not make the statements imputed to him, yet, when his attention was attracted to the details, he frankly conceded them in almost if not in every particular. To specify: He testified on further examination that he stated at the former trial that the horse with the cut knee was the one then mentioned in the indictment; that it was the horse that defendant took to Pendleton and Charles Rowland brought back from there, and, in further designation, was what was called the Masterson horse. So that the feature of any particular discredit of defendant's testimony by the method of examination pursued is eliminated. This being so, and the testimony being admissible as declarations against his interest, and constituting substantive proof to refute defendant's plea of former conviction for the same offense, we are induced to believe that allowing the testimony to go to the jury, even if for the purpose of impeachment, was harmless error and not sufficient cause for awarding a new trial.

3. Another error of the trial court is predicated upon the refusal to give the instructions submitted by counsel for defense relative to the plea of former conviction, num-

bered 2 and 4 in the record, and upon the giving of instruction numbered 5. By No. 2 it was sought to have the court tell the jury that the record and evidence in the former case shows that the gelding for the larceny of which he was then convicted was a gelding which Charles Rowland obtained from Eddie Masterson, and known and described in the testimony of the witnesses therein for the state as the Masterson horse, and that, if they found from the evidence in the present case that the gelding for the larceny of which defendant was being tried is the one that Rowland obtained from Eddie Masterson when it was a yearling, and is what is known as the Masterson horse, the defendant should be acquitted. By No. 4 it was sought to have the court further tell the jury that the fact as to whether or not the gelding in question had a blemished knee or one white foot, or was taken by defendant to Pendleton, is wholly immaterial in determining whether or not the horse is the Masterson horse, for the larceny of which the defendant had been convicted, and that the material question in the case was whether this gelding is the same animal that witnesses in the former trial testified was taken by Deal from the Campbell place last spring, and the same that Rowland obtained when a yearling from Eddie Masterson. Instruction No. 5, as given, is as follows:

“Defendant has not only entered a plea of not guilty, but has also entered in this case a plea of former conviction, viz., the conviction at the former October term of this court, 1901, for the larceny of a brown gelding, the property of this prosecuting witness, Charles Rowland. If the gelding for the larceny of which he is prosecuted in this case is the same animal for the larceny of which he was prosecuted in the former case, then the conviction in this former case is a bar to a prosecution in this case, and if you so find, then your verdict should be for the defendant upon this issue. But if you find that the prosecu-

tion in this case is for the larceny of a different gelding than the one for the larceny of which he was convicted in the former case, then your verdict on the issue of former conviction should be for the state on that issue."

For the purpose of perspicuity, we make further reference to the testimony. Eddie Masterson testified for the defense that he traded Rowland the horse colt, a dark bay, when it was a yearling; that the animal was four years old past; that he had examined the horse in Evans' livery stable, referred to in the prosecution in this case, and that it was the same horse he traded Rowland when a colt. Masterson further gave testimony to the same effect, and Campbell testified that he had seen the horse in Evans' livery stable, and that it was the same animal defendant had taken from his pasture in 1901; and this was somewhat corroborated by witness Crawford. In rebuttal the state offered evidence tending to show that the horse for which defendant had been convicted of stealing was the one Rowland obtained from Eddie Masterson when it was a yearling; that it had a white hind foot and a blemished knee; that the horse in Evans' livery stable was not the horse that Rowland obtained from Masterson, and that Rowland had raised the one in question from a suckling colt. From this testimony, and that which was adduced by the state in support of the prosecution, it is readily discerned that the instructions asked for are attended with an inherent vice. It consists of predicated the identity of the subject of larceny at the first trial with that of the latter upon one or two circumstances disclosed by evidence, and ignoring others that shed some bearing upon the question. The state was entitled to have the matter determined upon all the testimony, and the instructions would have been effective to withdraw at least a portion that had a pertinent bearing in the premises. They are argumentative and are specious for the use of the advocate

for the defense to show that as a matter of fact the defendant was being tried a second time for the same offense, but do not lay down sound rules of law for the government of the jury in determining their verdict.

4. Instruction No. 5 covered the question involved clearly and comprehensively, and was appropriately given. That the instruction described the subject of the larceny at the first trial as a brown gelding does not vitiate it. The color of the animal seems to have had no bearing upon the question of identity, as the horse in either case seems to have been described indiscriminately as a brown or dark bay, and the color was not relied upon as a distinctive feature. Identity was a question that was sought to be proved or refuted by other circumstances and conditions entirely.

5. The only other error assigned relates to the refusal of the court to admit the testimony of two witnesses—Hopper and Hammock—who were called by the defendant to prove that Rowland some time in the fore part of April, 1901, made the following statement to the defendant, namely, "The horse I traded you is at W. B. Campbell's place." The purpose of the testimony was to show substantively that defendant was the owner of the animal by the admission of the prosecuting witness. The answer of the state is that such a witness, although he be the owner of the property against which the offense was committed, is not in any legal sense a party to the record, whose admissions or declarations are binding upon the state, and they were not, therefore, competent evidence against the prosecution as having a tendency to defeat the action. This we deem to be a sound exposition of the law. The prosecution is beyond the control or limitation of the prosecuting witness, and whatever facts may be necessary to establish the defense must be shown otherwise than by his admissions or declarations. These are

admissible, as we have held in *State v. Deal*, 41 Or. 437 (70 Pac. 532), to affect his credibility. A proper foundation had there been laid for impeachment, such as would have been laid if any other witness had been under examination. Beyond this, it may be said they are inadmissible, except as a part of the *res gestæ*: *Roscoe*, Cr. Ev. (8 ed.) p. *52; *Williams v. State*, 52 Ala. 411; *Sayres v. State*, 30 Ala. 15; *Belt v. State*, 103 Ga. 12 (29 S. E. 451). In view of these authorities, which announce the better rule, there was no error in rejecting the proffered testimony of these witnesses. AFFIRMED.

Decided 25 May, rehearing denied 8 August, 1903.

SCOTT v. ASTORIA RAILROAD CO.

[72 Pac. 594.]

CHARGE TO JURY MUST BE CONSIDERED IN ITS ENTIRETY.

1. In passing upon the correctness of a single instruction or a part of a charge to a jury mere verbal slips should be disregarded, and the charge weighed as a whole.

RAILROADS--DANGEROUS LOCATION AS NEGLIGENCE.

2. A railroad cannot be charged with negligence in the location of its road-bed; hence an instruction that the action of a railroad company in constructing its track in a manifestly dangerous place, when, with reasonable care and at slight expense, it could have been constructed in a perfectly safe place, a few feet to one side, might be negligence which the jury could consider in determining the degree of diligence which the company should have exercised in watching, inspecting, and protecting its road, was erroneous, though in other parts of the charge the court correctly stated to the jury the degree of care required by the defendant in operating its road.

SUFFICIENCY OF EXCEPTION TO INSTRUCTIONS.

3. An exception to a part of a charge, particularly setting out the language complained of, is sufficient to raise the question of the accuracy of that part of the charge so specified.

GOVERNMENT WEATHER RECORDS AS EVIDENCE.

4. Records kept by public officers in the performance of their official duty, as, the amount of daily rainfall, or the velocity of the wind, recorded by officers of the United States Weather Bureau, are admissible in evidence to prove the facts therein stated.

SUMMARY OF MANY ENTRIES AS EVIDENCE.

5. Under the rule that a summary of many accounts or documents may be presented in lieu of the originals, where only the general result is desired as evidence (B. & C. Comp. § 703, subd. 5), an officer of the United States Weather Bureau may state the general results of the observations made at his station for a series of years, compiled from the entries made officially in the required records by the various persons who have been in charge of the station.

EXPERT TESTIMONY ON SLOPES OF EARTHWORK.

6. A competent civil engineer may, though he has never been directly employed in the building of railroads, give expert testimony as to the degree of inclination which should be given the slopes of railroad cuts or embankments in different soils and climates.

SCIENTIFIC AND PROFESSIONAL BOOKS AS EVIDENCE.*

7. Books on civil engineering are not competent evidence of the degree of slope that may safely be given to an earth embankment, and they should not be read to the jury.

USE OF SCIENTIFIC BOOKS TO SUSTAIN AN EXPERT.*

8. An expert may be permitted to give the names of authors on the subject under consideration who support the opinions he has expressed.

From Clatsop: THOMAS A. McBRIDE, Judge.

This is an action by Ella Scott, as administratrix of the estate of W. M. Scott, deceased, to recover damages for his death, which occurred January 12, 1901, while in the employ of the Astoria & Columbia River Railroad Company as a locomotive engineer, and is alleged to have been caused by its negligence in constructing its railroad too near a hillside, without adopting any means to prevent a slide, and in not properly watching its track, so as to discover the danger therefrom, and to warn the deceased thereof. The answer, after denying the material allegations of the complaint, alleges that the day the accident occurred was unusually stormy, the rainfall along the line of the defendant's railway being the heaviest of the season; that for more than two years prior thereto Scott had been in its employ as such engineer, was acquainted with the road and the construction thereof, and knew the nature, formation, and character of the country through which it extended, and the effect of rains thereon; that at the point where he lost his life no slide had ever occurred, but the road was necessarily constructed through a mountainous region, where slides frequently happen in the rainy season, against which it is impossible to guard, which fact he well

*NOTE.—With the case of *Union Pac. Ry. Co. v. Yates*, 40 L. R. A. 553, is a long note collecting and arranging the authorities on Scientific Books and Treatises as Evidence, in which the cases are classified under exact sciences, inexact sciences, law, and miscellaneous matters.—REPORTER.

knew; that, during all the time he was so employed, defendant kept a competent track walker to examine the line before every train passed over it, who immediately preceded the train operated by Scott, examined the track, and found no obstruction thereon; that it was Scott's duty to exercise great care in running the engine, and on the night of January 12, 1901, he was informed that slides might possibly occur, in consequence of the heavy rainfall, and notified to proceed with caution, but, not heeding the direction, he ran the engine at a higher rate of speed than usual, and in such a careless manner that he could not stop it in time to avoid the disaster. For a second defense, it is alleged that Scott, knowing the character of the road and the effect of heavy rains thereon, assumed the danger incident thereto. The reply having denied the material allegations of new matter in the answer, a trial was had, resulting in a judgment for plaintiff in the sum of \$4,000, and the defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Chas. W. Fulton*.

For respondent there was a brief over the names of *George Noland* and *Bennett & Sinnott*, with an oral argument by *Mr. Alfred S. Bennett*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion.

It is contended by defendant's counsel that the court erred in instructing the jury as follows:

"The railroad company has a right to locate its road, in a general way, upon any route it may deem fit, but in making a specific location at any particular point it should use due care to provide a safe place for its employes to work; and if it construct its road in a place that is manifestly dangerous, when, with reasonable care and slight expense, it could just as well be constructed in a perfectly safe place, a few feet to one side, that may be negligence

which you would have a right to consider in determining the degree of diligence and care defendant should have exercised in watching, inspecting, and protecting its road, and its employés thereon."

To render the application of this part of the charge intelligible, a brief statement of the facts involved is deemed essential. The bill of exceptions discloses that plaintiff introduced testimony tending to show that the defendant constructed a railway from Goble to Astoria, and operates trains thereon, and also over the line of the Northern Pacific Railway Company from Goble to Portland. The defendant's road near Bugby, for about half a mile, is built along the south bank of the Columbia River, about ninety feet from a cliff of basaltic rock, the disintegration of which, and the débris carried over the precipice by surface water, formed a slope of about 45 degrees, extending from the face of the crag to a line parallel with, and about six feet from, the track. This incline was originally covered with brush and trees, which were cut down when the railroad was built, and their stumps and roots had rotted. In the rainy season, considerable water flows over the precipice at this point; but, there being no ditch to carry it off, the earth and débris composing the acclivity become saturated therewith. Slides have occurred in the immediate vicinity prior and subsequent to the building of the road, but the defendant made no attempt to carry away the material of the slope, or to build retaining walls. The track walker, whose duty it was to inspect the line near Bugby, was obliged to examine a section of eight miles, and, to avoid being run down, was compelled to start on his velocipede thirty minutes before train time, according to schedule; and as the train was half an hour late on the evening of January 12, 1901, no watchman had passed over the track at that point within an hour of the train's arrival. Some time after the track walker passed Bugby,

a slide occurred, the rocks and earth lodging upon the track; and at about 10 o'clock that night the locomotive driven by Scott, and drawing a passenger train, ran into the obstruction, throwing the engine into the river whereby he was drowned.

It is argued by defendant's counsel that the court, in the instruction complained of, told the jury, in effect, that if the defendant could have located its road "in a perfectly safe place," but neglected to do so, a higher degree of care in operating it was demanded than in case they should find that such place could not have been discovered "a few feet to one side"; that, though the defendant might select the location of its road, it exercised the right to do so at its peril, and if a safer route than that chosen could have been discovered, but was not found, a different measure of care was required "in watching, inspecting, and protecting its road and employes"; that the degree of care imposed upon the defendant depended upon the wisdom exercised in locating its road; and that a jury, and not a railroad company, are the judges of where a line of railway shall be specifically located. Plaintiff's counsel maintain, however, that the exceptions taken to the instructions were general, and did not point out any particular part thereof of which the defendant complained, and that the charge should be considered in its entirety, and, when so construed, any seeming inconsistency therein is rendered harmless.

1. In construing the language employed by courts in charging juries in this state, a very liberal policy has been pursued; the rule being that, in considering a single instruction, the entire charge must be viewed, and, unless it appears that the jury were or might have been misled, mere verbal inaccuracies will not be sufficient cause for reversal: *Matlock v. Wheeler*, 29 Or. 64 (40 Pac. 5, 43 Pac. 867); *Smitson v. Southern Pac. Co.* 37 Or. 74 (60 Pac. 907);

Farmers' Bank v. Woodell, 38 Or. 294 (61 Pac. 837, 65 Pac. 520).

2. The court, in other parts of its charge, correctly instructed the jury that it was incumbent upon the defendant to exercise only reasonable and ordinary care; saying in one instance: "It is sufficient to defeat the right of the plaintiff to recover in this case that you should find from the evidence that defendant exercised such care as is common and usual under like circumstances and conditions, under prudent management." We think that notwithstanding the charge, as a whole, correctly informed the jury of the degree of care required of the defendant in operating its road, the instruction complained of might have misled them, for it seems to assume that negligence could be predicated upon the defendant's original location of the road. So many elements are to be considered in locating a railway, as factors in its construction and operation, that its permanent establishment must necessarily be left to its builders. To shorten distance, to increase speed, and to cheapen the cost of transportation of passengers and freight, railroad companies must occasionally cut long tunnels, build high trestles, and erect massive bridges, which might possibly be avoided in many instances by pursuing more circuitous routes. The demands of commerce necessitate the construction of railways in the places and manner indicated, and their location can never become a question to be submitted to a jury, for, if they could find that a certain line should have been deflected a "few feet to one side" of that determined upon by a railway company, where would be the limit to their power? The question to be determined by the jury was whether the defendant had exercised the degree of care that the law enjoins, which is measured by the extent of danger incident to the building and operating of its road on the line selected, and not by considering whether a

safer location might possibly have been made elsewhere. We think the instruction complained of is manifestly erroneous, and might have misled the jury, by permitting them to consider as negligence the location of the road in the particular place in which it was built, though the court, in other parts of its charge, correctly instructed them as to the degree of care which it was necessary for the defendant to exercise.

3. The remaining question, on this branch of the case, is whether the exception is sufficient to bring up for review the error relied upon. The bill of exceptions shows that, at the conclusion of the charge to the jury, defendant's counsel excepted to the part thereof hereinbefore quoted, particularly setting out the language complained of. An exception to a charge is sufficient when it distinctly points out the particular parts to which it is directed: *Langford v. Jones*, 18 Or. 307 (22 Pac. 1064); *McAlister v. Long*, 33 Or. 368 (54 Pac. 194). Under the rule announced in those cases, we think the exception adequate to challenge that part of the charge of which the defendant complains.

In view of a new trial, it is deemed proper at this time to consider other alleged errors which it is claimed by defendant's counsel the court committed.

4. At the trial, plaintiff's counsel, desiring to show that the rainfall on the day Scott lost his life was not unusual, but such as might reasonably have been anticipated, and the effects thereof guarded against by the defendant when building its road, called B. Johnson, who, as agent at Astoria of the Weather Bureau, testified that it was incumbent upon him to keep a record of the rainfall in that city; and, producing a book containing such record, he stated that on January 12, 1901, 2.72 inches of water fell in the twenty-four hours ending at 5 o'clock P. M. of that day, which was the greatest daily rainfall that winter. He was then permitted to state, over defendant's objection

and exception, that such quantity was less than the average excessive daily precipitation, which was 3.30 inches; giving the date and quantity of water that had fallen on the day of the greatest rainfall during ten years, and also the average annual rainfall for eighteen years preceding 1901. The witness, upon cross-examination, having stated that the book to which he referred was kept, prior to March, 1897, by his predecessors, defendant's counsel thereupon moved to strike out those parts of his testimony that related to the average rainfall and to the entries made in the record prior to his assuming charge of the office, on the ground that they were hearsay and not based upon his personal knowledge. Johnson having been permitted further to testify, in answer to questions asked by plaintiff's counsel, that the book to which he referred was an official government record, compiled from smaller books in his office, the motion was denied, and an exception allowed. The book kept by the agents of the Weather Bureau at Astoria not having been offered in evidence, it could only have been used to refresh the memory of the witness by an examination of entries made therein by him, or by another under his direction; and, this being so, could he testify concerning any memoranda made prior to his taking charge of the office? The rule is well settled that a record kept by a person employed in the signal service of the United States, whose public duty it is to record truly the facts therein stated, is admissible in evidence to prove such facts: *Knott v. Raleigh & G. R. Co.* 98 N. C. 73 (3 S. E. 735, 2 Am. St. Rep. 321); *Chicago, etc. Ry. Co. v. Traves*, 17 Ill. App. 136; *Moore v. Gaus & S. Mfg. Co.* 113 Mo. 98 (20 S. W. 975); *Evanston v. Gunn*, 99 U. S. 660. So, too, the record of the weather, kept for a number of years at a state public institution, is admissible to prove the meteorological condition of the atmosphere: *De Armond*

v. *Neasmith*, 32 Mich. 231; *Hart v. Walker*, 100 Mich. 406 (59 N. W. 174). In *Willis v. Lance*, 28 Or. 371 (43 Pac. 384, 487), an agent of the Weather Bureau was permitted to testify concerning the direction and velocity of the wind, from a record made in his office by an automatic register. So, too, in *State v. McDaniel*, 39 Or. 161 (65 Pac. 520), it was held that the testimony of an officer of the city fire department that the fire bell did not ring on a certain night before 12 o'clock, basing his knowledge on the fact that the automatic indicator of the department did not register a ringing of the bell, was competent. It is possible, however, that the record made by automatic registers may have consisted in hieroglyphics, which, if offered in evidence, could have not been understood by the jury; thereby rendering the testimony of the officers, who possessed a knowledge of the symbols used, necessary to explain their meaning. If this be so, the decisions in the last two cases are not controlling in the case at bar, and the legal principal involved must be considered in the nature of *res nova*.

5. The adjudicated cases sustain the rule that the best obtainable evidence should be adduced to prove every disputed fact (*Mooney v. Holcomb*, 15 Or. 639, 16 Pac. 716); the presumption being that higher evidence would be adverse, from inferior being produced: B. & C. Comp. § 788, subd. 6. The rule rejecting secondary evidence of a writing is subject, among others, to the exception that when the originals consist of numerous accounts, or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, oral evidence thereof is admissible: B. & C. Comp. § 703, subd. 5. It will be remembered that the witness had with him a book showing the quantity of rain that had fallen at Astoria each day for eighteen years; and, courts being obliged to take judi-

cial notice of the laws of nature (B. & C. Comp. § 720), it requires no proof to show that such a record, in this state, would contain so many entries that an examination of each would have occasioned great loss of time to the court; and, as only the general result of the whole was desired, we believe that the testimony objected to was admissible, under the exception mentioned. The record of the meteorological observations at Astoria, prior to March, 1897, was made by Johnson's predecessors; but, as official duty is presumed to have been regularly performed, the entries noted in the book produced by the witness must be treated as *prima facie* correct. In *Evanston v. Gunn*, 99 U. S. 660, Mr. Justice STRONG, commenting upon this subject, says: "Extreme accuracy in all such observations, and in recording them, is demanded by the rules of the signal service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure." In view of the public character of the entries, and the presumption of their verity, the witness was undoubtedly competent to state the general result of the whole record from an inspection thereof for the time embraced in the questions asked, though all such entries were not made during his term, for, as he was an expert in the manner of keeping the book produced, he was qualified, and could therefore testify as to the result of his examination and investigation: *State v. Reinhart*, 26 Or. 466 (38 Pac. 822); *Salem Traction Co. v. Anson*, 41 Or. 562 (67 Pac. 1015, 69 Pac. 675, 8 Mun. Corp. Cas. 701).

6. W. J. Roberts, as plaintiff's witness, having testified that he was a graduate of the University of Oregon, and also of the Massachusetts Institute of Technology, where he

took a course in civil engineering, which branch, including the science of railroad construction, he was engaged in teaching at the Agricultural College and School of Science at Pullman, Washington; that he had practiced civil engineering fourteen years, and, though he had never been actively engaged in railroad building, he had constructed roads, irrigating ditches, canals, and other works requiring the construction of slopes; that he was acquainted with the approved methods of civil engineers in relation to the construction of railroads and embankments; that, having visited the place where Scott lost his life, he measured the slope from its foot, at a point six feet from the track, to the bluff, and found it to be 105 feet, and its angle, where the surface was undisturbed by the slide, 46 degrees, —was permitted, over defendant's objection and exception, to state that there are certain standard slopes, approved by civil engineers, that are applicable to all kinds of known earth; to detail the degrees of inclination recommended by a majority of such engineers for the construction of slopes in shallow or deep cuts, and in cohesive or immiscible soils; and to give the names of several authors whose works on civil engineering coincided with his opinion. The admission of the testimony so objected to presents the question whether a witness who has no actual experience in railroad building, and whose knowledge thereof is derived from the study of works on civil engineering, is competent to express an opinion upon the degree of inclination of earthwork; and, if so, can he properly refer to the authors whose works on the subject corroborate his opinion?

In *Boyle v. State*, 57 Wis. 472 (15 N. W. 827, 46 Am. Rep. 41), one Dr. Cody, in answer to a hypothetical question, was permitted, over objection and exception, to state that in his opinion a certain person had died from asphyxia; saying, however, that his conclusion was based

upon information derived from the perusal of medical books; that he had never seen a case of death from strangulation, and did not know, from experience, its post-mortem indications. He was also permitted to be interrogated as follows: "Do you know, from books or otherwise, whether death is ever produced from strangulation without leaving marks upon the throat; that is, your own personal observation?" to which he replied: "In Taylor's Jurisprudence such cases are recorded. Q. In standard medical works? A. Yes, sir." In that case, the defendant having been convicted, the judgment on appeal was reversed, the court holding that an error was committed in permitting an expert to testify as to statements contained in medical books; Mr. Justice TAYLOR saying: "The palpable error in permitting Dr. Cody [to answer the questions hereinbefore detailed] is apparent from the fact that he testified on the stand that he had no personal knowledge of the subject he was testifying about." A new trial having been granted, the defendant was reconvicted, and appealed; and, in affirming the judgment, Mr. Chief Justice COLE, referring to the examination of medical witnesses, says: "They testified as to facts within their personal knowledge; also, probably, to matters derived from professional study and experience. We suppose they could give their opinion as to the cause of the death of the deceased. * * When this case was here before, we did not intend to lay down any new rule as to expert testimony, and certainly did not, as an examination of the opinion of Mr. Justice TAYLOR will show": *Boyle v. State*, 61 Wis. 440 (21 N. W. 289).

In *Soquet v. State*, 72 Wis. 659 (40 N. W. 391), it was held, however, that a physician could not testify as an expert as to symptoms of arsenical poisoning, if his knowledge of the subject had been obtained wholly from medical or scientific books or medical instruction, and not from per-

sonal observation or experience. Mr. Justice ORTON, referring to the admission of the testimony of physicians whose knowledge of the symptoms of arsenical poisoning was derived solely from medical or scientific books and from medical instruction, says: "In receiving their testimony, the court committed and repeated the very error by reason of which the judgment in the case of *Boyle v. State*, 57 Wis. 472 (15 N. W. 827, 46 Am. Rep. 41), was reversed." See, also, *Zoldoske v. State*, 82 Wis. 580 (52 N. W. 778). In *State v. Simonis*, 39 Or. 111 (65 Pac. 595), Mr. Chief Justice BEAN calls attention to the rule adopted in Wisconsin, and says: "But in an equally well considered opinion by the Supreme Court of Michigan (*People v. Thacker*, 108 Mich. 652, 66 N. W. 562), it is held that a practicing physician, who is a graduate of a reputable medical college, and who has sufficiently qualified himself to have a definite opinion of his own, may testify as an expert on the subject of poisoning, though it is not shown that he has had any experience in such cases." We believe the Michigan rule is founded upon better reason and supported by a greater weight of authority than that announced by the Supreme Court of Wisconsin. See, upon this subject, Gillet, Indir. & Collat. Ev. § 209; Rogers, Ex. Test. (2 ed.) § 1; *Citizens' Gas-light Co. v. O'Brien*, 118 Ill. 174 (8 N. E. 310); *Carter v. State*, 2 Ind. 617; *City of Fort Wayne v. Coombs*, 107 Ind. 75 (7 N. E. 743, 57 Am. Rep. 82); *State v. Terrell*, 12 Rich. Law, 321. An expert is a person who is so qualified, either by actual experience or by such careful study, as to enable him to form a definite opinion of his own respecting any division of science, branch of art, or department of trade, about which persons having no particular training or special study are incapable of forming accurate opinions or of deducing correct conclusions: *State v. Anderson*, 10 Or. 448; *Farmers' Bank v. Woodell*, 38 Or. 294 (61 Pac. 837, 65 Pac. 520); *State v. Simonis*, 39 Or. 111 (65 Pac. 595).

Though Roberts had no acquaintance with railroad building, his knowledge of the subject, derived from study of works on civil engineering, and his experience in constructing roads, irrigating ditches, and canals, undoubtedly qualified him to express an opinion respecting the "approved" slope of an embankment: *Central R. Co. v. Mitchell*, 63 Ga. 173.

7. Whatever the rule may have been, it is now almost universally conceded that medical books cannot, over the objection of the adverse party, be introduced in evidence to prove any statement contained therein: *City of Bloomington v. Shrock*, 110 Ill. 219 (51 Am. Rep. 679); *Commonwealth v. Sturtivant*, 117 Mass. 122 (19 Am. Rep. 401); *Burg v. Chicago, R. I. & P. Ry. Co.* 90 Iowa, 106 (57 N. W. 680, 48 Am. St. Rep. 419); *Link v. Sheldon*, 18 N. Y. Supp. 815; *Lilley v. Parkinson*, 91 Cal. 655 (27 Pac. 1091). The reasons usually assigned for the rejection of such a work are that the statements which it contains lack the solemnity of a judicial oath; that the author, not being present, cannot be cross examined; that, if he could be called upon to state the grounds of the opinions so announced, he might change or modify them; that several recognized "schools" of medicine exist, that materially differ in theory and practice; that the language used in medical books is technical, and not capable of being understood by ordinary persons, and that the practice of medicine and surgery is changing, so that what was formerly regarded by the profession as settled has become in many instances obsolete, or superior methods or more efficacious remedies have been substituted therefor: *Ashworth v. Kittridge*, 12 Cush. 193 (59 Am. Dec. 178); *Gallagher v. Market St. Ry. Co.* 67 Cal. 13 (6 Pac. 869, 51 Am. Rep. 680, note). Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety

and interest: B. & C. Comp. § 770. There are certain facts constituting a species of evidence (B. & C. Comp. § 680) of such general notoriety that they are assumed to be already known to the court, and no evidence thereof need be produced: B. & C. Comp. § 719. In all cases in which judicial notice of facts may be taken by the court, if it is not sufficiently advised thereon, it may resort for its aid to appropriate books or documents for reference (B. & C. Comp. § 720), and declare its knowledge to the jury, who are bound to accept it as conclusive: B. & C. Comp. § 136; *State v. Magers*, 35 Or. 520 (57 Pac. 197). Though a court must take judicial notice of the laws of nature (B. & C. Comp. § 720), the probability of a landslide is not such a fact as a resort to appropriate books would enable the court to declare as conclusive to the jury. In determining the angle of repose of an embankment, the possibility of a slide depends upon the character of the material, the climatic influences thereon, and so many other elements that it cannot be said, as a matter of law, to be a fact of "general notoriety and interest," so as to render books on civil engineering primary evidence thereof: B. & C. Comp. § 770; *Gallagher v. Market St. Ry. Co.* 67 Cal. 13 (6 Pac. 869, 51 Am. Rep. 680).

8. These books not being admissible upon either of the grounds stated, the question to be considered is whether the court erred in permitting the witness to refer to them as tending to corroborate his opinion. In *Collier v. Simpson*, 5 Carr. & P. *73, decided at *nisi prius* in 1831, it was held by Mr. Chief Justice TINDAL that, though medical books which were stated by expert witnesses to be standard authority in that profession could not be offered in evidence to prove any facts therein stated, such witnesses might be asked their judgment, and the grounds thereof, which might in some degree be founded on such books, as a part of their general knowledge. In *Central R. Co. v.*

Mitchell, 63 Ga. 173, an engineer, having been injured in a slide of earth upon a railroad track, instituted an action to recover the damages sustained, and called a civil engineer, who testified in relation to the character of the cut where the slide occurred, the effect of water upon the material, as tending to disturb it, and gave the angle of the steepest slope for which he knew any authority, saying: "The rules for construction of cuts, etc., which I have given, are found in books on engineering. I give these rules solely from what I recollect of the books. These rules are found in Mahan, Gillespie, and Gilmore, and many others." The plaintiff having secured a judgment, Mr. Justice JACKSON, speaking for the court, in affirming it, says, concerning the testimony of the civil engineer: "The expert was competent to testify. Every expert derives much of his knowledge from books as well as from experience, and can give his opinion based upon the knowledge acquired from both sources." In *Western Assur. Co. v. Mohlman Co.* 83 Fed. 811 (28 C. C. A. 157, 40 L. R. A. 561), upon an issue as to whether a building in which insured property was confined fell before a conflagration, or as a result of the fire, it was held that a civil engineer, testifying as an expert, may read in support of his opinion excerpts from engineering books recognized as standard authorities, giving the tabulated results of tests made to determine the strength and resisting power of timbers of the kind used in the construction of the building; the court saying: "The general proposition that scientific books are not to be read in evidence is a familiar one, and many citations from text writers and reported cases are found in the brief of the plaintiff in error. Nearly all the reported cases deal with medical works, and most excellent reasons for the application of the general rule in such cases may be found therein. But the rule is not of universal application. It would be a reproach to the admin-

istration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence (*Railroad Co. v. Putnam*, 118 U. S. 554, 7 Sup. Ct. 1); and yet these tables show merely the deductions from records of past transactions, when neither the record of the transactions nor the individual who has worked out the deductions is called to testify to the accuracy of his work, or to the conditions under which it was performed. So, too, almanacs, astronomical calculations, tables of logarithms, interest tables, weather reports, tables of the rise and fall of the tide, have been admitted in evidence."

A text writer, discussing this subject, says: "Even by those courts who have been most resolute in excluding such works when offered substantively, it is agreed that an expert may show that his views are sustained by standard authorities in his profession": Wharton, Evidence, § 438. This author further says: "It has, indeed, been held that an expert, when called to state the sense of his profession on a particular topic, may cite authorities as agreeing with him": Wharton, Evidence, § 666. Professor Lawson, in his work on Expert & Opinion Evidence (2 ed. p. 176), says: "Notwithstanding the inadmissibility of the books, the opinions contained in them may go to the jury through the mouth of a witness—an expert." It will be generally admitted that standard works on civil engineering are treatises that relate more nearly to matters of an exact science than do medical books; but whether excerpts from the former can be read to corroborate the opinion of an expert witness, it is not necessary to inquire, for the ques-

tion is not involved herein. Though the weight of current authority prevents the reading of scientific books to contradict a witness generally, yet, when he bases his opinion upon the work of a particular author, such book may be read in evidence for that purpose: *Connecticut Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516; *City of Bloomington v. Shrock*, 110 Ill. 219 (51 Am. Rep. 679); *Pinney v. Cahill*, 48 Mich. 584 (12 N. W. 862); *Marshall v. Brown*, 50 Mich. 148 (15 N. W. 55); *Huffman v. Click*, 77 N. C. 55; *City of Ripon v. Bittel*, 30 Wis. 614. Plaintiff's counsel, by securing from Roberts a statement of the authors whose works on civil engineering supported the opinion of the witness, thereby invited his cross-examination, in which case the books to which he referred could have been read in evidence to contradict him. True, it may be possible that a pretended expert might give an opinion upon a material fact, and fortify it by referring to the work of some fictitious author upon the subject; and, the adverse party being unable to secure the book mentioned, the reference of the witness might add to his false testimony a weight to which it was not entitled. In the case at bar, however, no danger from the course of practice so assumed could have been possible, for Roberts was unquestionably a reputable witness, and thoroughly qualified to express an opinion upon the matter to which his attention was directed; and, in our opinion, it was proper to permit him to name the authors whose works on civil engineering coincided with his views. But for the error committed in giving the instruction complained of, the judgment is reversed, and a new trial ordered.

REVERSED.

Argued 20 November, decided 15 December, 1902.

STATE v. HUMPHREYS.

[70 Pac. 824.]

INFORMATION—LARCENY BY BAILEE—SURPLUSAGE—DUPLICITY.

1. Among the general rules recognized in this state, for construing indictments and informations are, that allegations not necessarily descriptive of the offense may be rejected as surplusage, if the charge is complete without them, and that, where several acts are enumerated alternatively, the doing of each one being prohibited under a given penalty, they may be charged conjunctively as one offense, when not repugnant to each other.

Both these rules are thus applied in this case: Hill's Ann. Laws, § 1771, provides that any person being a bailee, who embezzles or converts to his own use, or fails, neglects or refuses to deliver, keep, or account for, property placed in his care according to his trust, shall be guilty of larceny. Section 1773 requires that indictments must charge but one offense, and in one form only. *Held*, that an information alleging that defendant, being a bailee of wheat for hire "did * * fail, neglect and refuse to keep or account for said wheat according to the nature of his trust," by stealing, embezzling and converting the same to his own use, does not charge more than one crime by the use of the word "or", for the quoted words (which include the "or") may be omitted without impairing the charge of larceny; and the remainder of the information charges defendant with "taking, stealing and carrying away, and embezzling and converting said wheat," which is a permissible form of charging a violation of a statute disjunctively worded.

INFORMATION—DEGREES OF LARCENY—SURPLUSAGE.

2. Even if an information does charge several offenses, a conviction of any one of them should be sustained, if they are all of the same class and differ only in degree.

LARCENY BY WAREHOUSEMAN—ALLEGING PAYMENT OF CHARGES.

3. An information against a warehouseman for larceny by stealing and converting property deposited with him need not allege a payment or tender of the storage charges, for the gist of the offense is not a failure to return the deposited property on demand, but an unlawful conversion.

LARCENY BY BAILEE—STATUTES.

4. A warehouseman who gives to a depositor receipts not in the form prescribed by Hill's Ann. Laws, §§ 4201-4207, regulating warehousemen, may be prosecuted for a conversion of the bailed property under section 1771, defining and punishing larceny by bailee, instead of under the special provisions regulating warehousemen.

CHANGE OF VENUE—ABUSE OF DISCRETION.

5. The right to change the venue of a trial is one confided by statute to the discretion of the trial judge, to be carefully exercised to the end that all interested parties may be justly treated; and in the present instance it does not appear that the trial judge abused the discretion reposed in him.

CRIMINAL INTENT AS AN ELEMENT OF LARCENY.

6. While it is a general rule that the state must prove a criminal intent in all cases of felony, it is not necessary to prove it by direct testimony, the jury being permitted, upon proof of the overt act, to deduce the intent from a consideration of the surrounding circumstances.

WAREHOUSE CONTRACT—SALE—BAILMENT.

7. A placing of property in a warehouse under an agreement to pay storage, but with the expectation of selling it to the best purchaser, is a bailment and not a sale, though the depositor was willing to take the market price in cash rather

43	44
48	212

43	44
147	237
147	438

43	44
148	174
48	421

than the property, if the warehouseman should prefer that method of settlement upon a demand being made for the property.

REMARKS BY COURT—

8. Statements made by a trial judge during an argument by counsel on a proposition of law, illustrating a hypothetical case, and accompanied by such a statement as, "I think that is the law; I do not intimate that the defendant did any of those things, that is for the jury to determine," is not an invasion of the province of the jury, or an expression of opinion as to the facts in issue, or the weight of evidence: *State v. Lucas*, 24 Or. 168, distinguished.

EXAMPLE OF PROPER CROSS-EXAMINATION—

9. A witness having testified that the name of a stated person had been signed to certain papers by some of his employes, it is within the limits of proper cross-examination to ask the witness if such employes did not have authority to sign the name of their employer as they had done.

From Marion: GEORGE H. BURNETT, Judge.

A. M. Humphreys appeals from a judgment sentencing him for larceny.

AFFIRMED.

For appellant there was a brief over the names of *William H. Holmes*, *Samuel T. Richardson*, and *I. N. Maxwell*, with an oral argument by *Mr. Holmes* and *Mr. Maxwell*.

For the state there was a brief and an oral argument by *Mr. Julius N. Hart*, District Attorney, and *Mr. John H. McNary*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, A. M. Humphreys, was accused by the district attorney of the crime of larceny by bailee, alleged in the information to have been committed as follows:

"The said A. M. Humphreys, on the 30th day of March, 1901, in the County of Marion and State of Oregon, then and there being the bailee with hire of 204 bushels of wheat, the same being then and there the personal property of one E. T. Hall, of the value of \$102, did then and there wrongfully, unlawfully, and feloniously fail, neglect, and refuse to keep or account for the said wheat according to the nature of his trust, the said wheat having been theretofore delivered and intrusted to the said A. M. Humphreys, as such bailee, by the said E. T. Hall, as bailor, by then and there wrongfully, unlawfully, and feloniously taking, stealing, and carrying away, and embezzling and converting said wheat to his, the said A. M.

Humphreys', own use, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

A demurrer on the following grounds: "First, that the information in this cause does not substantially conform to the requirements of Chapter VIII of the Criminal Code of the State of Oregon; second, that more than one crime is charged in this information; third, that the facts stated in the information in this cause do not constitute a crime; fourth, that the information in this cause contains matter, which, if true, would constitute a legal justification and excuse of the crime charged and other legal bar to the action,"—having been interposed and overruled, the defendant entered a plea of not guilty, and, a trial being had, he was found guilty as charged, and sentenced to imprisonment in the penitentiary for the term of two years, from which judgment he appeals.

The information having alleged that the defendant "did then and there wrongfully, unlawfully, and feloniously fail, neglect, and refuse to keep or account for the said wheat," it is contended by his counsel that the use of the word "or" in the language quoted violates Section 1273, Hill's Ann. Laws, which provides that the indictment must charge but one crime, and in one form only. The statute which the defendant is charged with violating, so far as deemed applicable herein, is as follows: "If any bailee, with or without hire, shall embezzle, or wrongfully convert to his own use, or shall secrete, with intent to convert to his own use, or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care or control, and which may be the subject of larceny, such bailee, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly": Hill's Ann. Laws, § 1771. If the information contained no other aver-

ments of the facts constituting the commission of the alleged crime, the legal principles insisted upon would probably be applicable, for the rule is nearly universal that, when a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all such acts, when not repugnant to each other, may be charged cumulatively as one offense, by using the copulative "and" where "or" appears in the statute; but where the latter word is so used in the sense of "to wit," or as indicating that the terms preceding and following are synonymous, it is unnecessary to observe the distinction in the manner of enumerating the several acts constituting the alleged crime, in which case the disjunctive "or" may be used in the information or indictment in the same manner as it appears in the statute: 10 Ency. Pl. & Pr. 490, 536; *State v. Carr*, 6 Or. 133; *State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229. Our statute prescribing the method of alleging facts constituting the commission of crimes contains the following provisions: "All the forms of pleading in criminal actions heretofore existing are abolished: and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this code": Hill's Ann. Laws, § 1266. "The indictment must contain,—

* * 2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended": Hill's Ann. Laws, § 1268. "The indictment must be direct and certain, as it regards,—1. The party charged; 2. The crime charged; and, 3. The particular circumstances of the crime charged when they are necessary to constitute a complete crime": Hill's Ann. Laws, § 1271.

In applying these liberal rules to the method of charging the acts constituting the commission of crimes, it is

quite well settled that an allegation in an indictment which is not necessarily descriptive of the offense may be regarded as surplusage and rejected, without vitiating the pleading, if enough remains to constitute a valid charge: 10 Ency. Pl. & Pr. 530; *Burchard v. State*, 2 Or. 78; *State v. Horne*, 20 Or. 485 (26 Pac. 665); *State v. Lee*, 33 Or. 506 (56 Pac. 415). Applying this rule to the averments of the information, we believe that the following part thereof was not descriptive of what was legally essential to the charge, and might properly be stricken therefrom as surplusage, without vitiating the pleading, to wit: "Did then and there wrongfully, unlawfully, and feloniously fail, neglect, and refuse to keep or account for the said wheat according to the nature of his trust," the remaining averments being descriptive of the acts constituting a violation of the statute, the material part of which, so far as this information is concerned, is as follows: "If any bailee * * shall embezzle, or wrongfully convert to his own use, * * any * * property of another delivered or intrusted to his care or control, * * such bailee, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly": Hill's Ann. Laws, § 1771. It will be observed that the parts of the statute last quoted enumerate several acts in the alternative, the doing of any of which is deemed larceny, and a conviction thereof subjects the offender to the punishment prescribed for the commission of that crime. It will be remembered that, omitting the surplus words of the information, it charges the commission of embezzlement and conversion of the wheat delivered to the defendant as bailee cumulatively as one offense, but, the pleader having adopted the copulative "and" where the disjunctive "or" occurs in the statute, the information conforms to the rule prescribed.

2. It is urged in defendant's behalf that the information charges the commission of three distinct offenses, to wit,

larceny by bailee, embezzlement, and simple larceny, and that, having interposed a demurrer on the ground of the duplicity, the court erred in overruling it. If it be assumed that these several crimes are charged by the information, they are generic in character, and differ only in degree of aggravation, in which the greater necessarily includes the less, and, as each is deemed larceny by the statute, and a bailee convicted thereof punished accordingly, and, as the value of the property alleged to have been taken, embezzled, and converted, is stated, it follows that a verdict of guilty as charged in the information renders the offender subject to the punishment prescribed for the commission of grand larceny: *State v. Hanlon*, 32 Or. 95 (48 Pac. 353); *State v. Savage*, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128). In *State v. Thompson*, 28 Or. 296 (42 Pac. 1002), the defendant having been charged as "bailee and trustee" of certain property, which it was alleged he feloniously embezzled and unlawfully converted to his own use, in violation of Hill's Ann. Laws, § 1771, it was contended in his defense that the indictment charged two offenses, to wit, larceny by bailee and conversion by trustee; but it was held that the point insisted upon was without merit, Mr. Chief Justice BEAN saying: "The objection to the indictment is untenable. It is in the language of the statute, and does not charge more than one crime."

3. In the case at bar it was not alleged that the compensation which the defendant was to receive for his care of the property had been paid or tendered; but, as he was charged as bailee of wheat for hire, it is contended that the information does not state facts sufficient to constitute a crime, and that, a demurrer having been interposed on that ground, the court erred in not sustaining it. In overruling the demurrer the court must have treated as unnecessary that part of the information hereinbefore ad-

verted to as surplusage, and, this being so, the averment that defendant was a bailee for hire became immaterial, and might also have been rejected for the same reason. If the gravamen of the action had been an alleged failure to account for the wheat of which the defendant was the bailee for hire, an averment of the payment or tender of the compensation agreed upon for its care might possibly have been necessary; but the information having alleged that he feloniously took, stole, carried away, embezzled, and converted said wheat to his own use, it was unnecessary to allege a payment or tender of the compensation which he was to have received. Thus, in *State v. Rieger*, 59 Minn. 151 (60 N. W. 1087), it was held to be unnecessary to allege in an indictment a tender of a warehouse receipt, or to aver a demand for the return of the grain for the deposit of which the receipt was issued, Mr. Justice MITCHELL, saying: "It can hardly be necessary to add that, if defendant had unlawfully shipped out this wheat contrary to the provisions of section six, the offense was complete without any tender of the receipt or demand for the grain by the owner. The gist of the offense charged is the unlawful disposition of the grain, and not a failure to redeliver it on demand."

4. The defendant having been charged with a violation of Section 1771, Hill's Ann. Laws, approved October 26, 1882, it is claimed that an act entitled "An act to regulate warehousemen, wharfingers, commission men and other bailees, and to declare the effect of warehouse receipts," approved February 23, 1885 (Hill's Ann. Laws, §§ 4201-4207), repealed by implication so much of the preceding section as related to a bailment of grain, or an alleged conversion thereof by a warehouseman; and having, within the time allowed therefor, moved in arrest of judgment on the ground that the information did not state facts sufficient to constitute a crime, the court erred in over-

ruling the motion. It is argued that the warehouse act is complete within itself, and, as section 8 thereof expressly repeals all other acts or parts of acts in conflict therewith (Laws, 1885, p. 61), it is manifest that the legislative assembly intended that said act should take the place of all other statutes upon the subject; that such intention is evidenced by the fact that the prior statute and the warehouse act prescribe different penalties, thus showing that they are in conflict, and that the latter act prevails, under which, if the state had any case against the defendant, he could unquestionably have been prosecuted.

The warehouse act, so far as deemed applicable herein, is as follows: "It shall be the duty of every person keeping * * any warehouse * * where grain * * is stored, to deliver to the owner of such grain * * a warehouse receipt therefor, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored": Hill's Ann. Laws, § 4201. The deposit of the wheat alleged in the information to have been converted by defendant to his own use was evidenced by the following memoranda:

"No. 138.

HUMPHREYS' WAREHOUSE.

Original.

Salem, Oregon, August 11, 1900.

Received from E. T. Hall 51.30 bushels wheat. Sacks returned, 30. Sacks returned empty, —.

A. M. HUMPHREYS & Co., Weigher.
Swart.

"No. 142.

HUMPHREYS' WAREHOUSE.

Original.

Salem, Oregon, August 13, 1900.

Received from G. Hall 50.55 bushels wheat. Sacks returned, 30. Sacks returned empty, —.

A. M. HUMPHREYS & Co., Weigher.

"No. 145. HUMPHREYS' WAREHOUSE.
Original. Salem, Oregon, August 13, 1900.
Received from G. Hall 52.55 bushels wheat. Sacks re-
turned, 30. Sacks returned empty, ——.
A. M. HUMPHREYS, Weigher.

"No. 150. HUMPHREYS' WAREHOUSE.
Original. Salem, Oregon, August 14, 1900.
Received from E. T. Hall 49.10 bushels wheat. Sacks
returned, 29. Sacks returned empty, ——.
A. M. HUMPHREYS & Co., Weigher."

An examination of these receipts will show that they do not comply with the requirements of the statute, in that they fail to state the condition or quality of the wheat deposited, and omit the terms and conditions upon which it was stored. Whether an information for a violation of the provisions of the warehouse act could be supported by such evidence of the deposit of grain as these receipts afford it is not necessary now to inquire, for, since they failed to conform to the requirements of the statute in the particulars indicated, the defendant was, in our opinion, properly informed against as an ordinary bailee, under Section 1771, Hill's Ann. Laws, and hence no error was committed in overruling the demurrer, or in refusing to arrest the judgment.

5. It is contended by defendant's counsel that the court erred in overruling their motion for a change of venue. The defendant's affidavit therefor is to the effect that the people of Marion County, in consequence of the many bank and warehouse failures therein, were so prejudiced against him, that he could not secure an impartial trial therein, and for a like reason could not obtain a fair trial in the counties of Benton, Clackamas, Lane, Lincoln, Polk, Tillamook, Washington, or Yamhill; that, though he was innocent of any crime, the people of said counties were so prejudiced against him that they would not believe the

most reliable testimony that could be produced in his behalf, and that many of said persons had threatened to mob and hang him; that their excitement and frenzy were caused by the many warehouse and bank failures, sixteen of which (naming them) occurred in Marion, and thirty (naming them) in the other counties; that by reason of said failures the people therein organized secret alliances, by means of which they kept in constant communication with each other in respect to the merits of his cause; that false statements as to his embarrassment in the warehouse business, and shortage of grain stored with him, have been circulated in said counties, and are believed to be true, and no amount of evidence, however reliable, could convince them to the contrary; that, among other false statements, it was reported that he stole the grain stored with him, and especially that specified in the information, and that he had shipped said wheat, and sold it, without the consent or knowledge of the owners; that it had been falsely reported in said counties that he had stolen and shipped away wheat, and appropriated the proceeds thereof to pay debts contracted in gratifying his extravagant habits; that many persons in said counties who did not know the facts involved in this action, who never stored wheat with him or knew him, were then, and for a long time prior thereto had been, threatening to hang him, because they had lost money deposited in a bank that suspended payment, or property stored in some other warehouse by the failure thereof; that many of his personal friends had become his enemies, and were threatening to do him bodily harm; that two days prior to the making of his affidavit one of his most intimate friends, who never stored any grain with him, when spoken to about the trial of this action, cursed and railed at him, remarking that he and all other warehousemen and bankers were thieves, and ought to be hanged; that there had been a failure to

convict bankers and warehousemen who were innocent of any crime, notwithstanding which the people in said counties generally believed that all men following these occupations should be convicted, and their excitement over such failures compelled them to seek some sacrificial victim, and he had been selected for that purpose; that, having become embarrassed in the wheat business, he was taken sick, about March 1, 1901, and the storers of grain with him became much excited, and while he was unable to transact any business he notified said storers to meet him at his warehouse at Salem, Oregon, at a day named, at which time, and while he was ill in body and mind, some of said storers became excited and threatened to hang him, or to throw him into the Willamette River, whereupon the meeting broke up in almost a general mad panic; that he suffered a relapse from such excitement and exposure incident to the meeting, and for some time thereafter was out of his mind; that he had been informed and verily believed that secret meetings had been held at Salem, during that and the preceding term of court, by the people of Marion County, at which threats of lynching him were freely discussed, and such menace would have been put into execution but for the counsel of some cool-headed persons; that he had discussed these matters with the more responsible people of Marion and said other counties, and had been informed by them that the people generally entertained bitter feelings against him because he was a warehouseman, and that he would not only be obliged to prove his own innocence in this action, but also that of all other warehousemen and bankers who had failed in business in said counties, before he could with the remotest possibility secure a verdict of acquittal from any jury that could be selected in either of said counties.

The supplemental affidavit of J. B. Ashley is to the effect that he had stored in defendant's warehouse 750

bushels of wheat, no part of which had ever been received by him; that he was present at the meeting referred to in the preceding affidavit, and corroborates the defendant in respect to the threats then made to do him bodily injury; and that in consequence of the frenzy there manifested, and of the excitement incident to bank and warehouse failures, the defendant could not, in his opinion, secure an impartial trial in Marion County. The defendant also filed the affidavits of twenty-seven other persons to the effect that each was acquainted with a great many people residing in said counties; that defendant's failure had been generally discussed therein, and a very bitter feeling existed against him and all other warehousemen that had failed, some of the deponents saying that they had heard of threats of violence having been made against the defendant, and all joining in the opinion that it would be impossible for him to secure an impartial trial in either of said counties.

The state, resisting the motion for a change of venue, filed the affidavit of W. D. Claggett to the effect that he attended the meeting of creditors referred to by the defendant, held in March, 1901, and that no threats were made thereat to lynch, mob, or do other violence to him. The affiant controverts the statements made in defendant's affidavit, but the following, among other denials, is criticised, to wit: "That it is not true that by reason of many warehouse failures a general or secret alliance of any kind has been organized in all or any of the counties mentioned in defendant's affidavit for the purpose of assisting in the conviction of the defendant or any other warehousemen, or for any other purpose whatever." He further states that, though warehouses were operated at Macleay and Salem by defendant, he was not known in other parts of Marion County by many people, nor had they heard that he was accused of the commission of any crime, and that no diffi-

culty would be encountered in securing in said county a jury that would be absolutely without bias or prejudice against him. The state also filed the affidavits of thirty-one other persons, controverting the statements contained in defendant's affidavit, except in a few particulars, each deponent expressing the opinion that the people of Marion County were not prejudiced against defendant, and that he would be able to secure a fair and impartial trial therein. The defendant filed a counter affidavit to the effect that ten of the persons so resisting his motion were either depositors of wheat in his warehouse, or related to those storing grain therein, and therefore interested in securing his conviction. It is argued by his counsel that the showing so made by their client presented such a state of facts as indicated that it was impossible for him to secure in said county an impartial trial, and that the court's refusal to grant a change of venue was such an abuse of discretion as to render its action subject to review.

The organic law of the state guarantees to the accused in all criminal prosecutions the right to a public trial by an impartial jury in the county in which the offense shall have been committed: Const. Or. Art. I, § 11. The right to change the place of trial, however, in an action for a felony, is expressly conferred by statute, and may be exercised when it appears by affidavit to the satisfaction of the court that a fair and impartial trial cannot be had in the county where the action is commenced: Hill's Ann. Laws, § 1222. The power thus vested in the trial court is coupled with a sound legal discretion, to be exercised in determining the question of fact put in issue by the affidavits of the parties in support of and opposed to the change of venue, and the action of the court thereon will not be reviewed unless there has been an abuse of such discretion: 4 Ency. Pl. & Pr. 499; *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797); *State v. Savage*, 36 Or. 191 (60 Pac. 610,

61 Pac. 1128); *People v. Yoakum*, 53 Cal. 566; *People v. Elliott*, 80 Cal. 296 (22 Pac. 207); *Price v. People*, 131 Ill. 223 (23 N. E. 639). In *Kelly v. State*, 52 Ala. 361, Mr. Justice MANNING, in speaking of the superior advantage possessed by a trial court in passing upon an application to change the place of trial, says: "And a circuit judge on the spot, in 'view of all the circumstances,' and having knowledge of persons, facts, and influences, is much better qualified than the supreme court at a distance, with only ingeniously written *ex parte* affidavits before it, to determine the fact whether or not it is true that the defendant cannot have a fair trial by an impartial jury in the county in which he is indicted." The reason so assigned affords a strong argument, which might properly be invoked in every case; but it is not conclusive, however, and in every application of this character the issue of fact presented must be examined upon its merits. After considering the affidavits of the respective parties in the light of this rule, we are not prepared to say that there has been an abuse of discretion, and hence the action of the court in refusing to grant the change of venue will not be disturbed.

6. The state having introduced its evidence and rested, defendant's counsel moved the court to instruct the jury to return a verdict of not guilty, but, the motion having been denied, it is contended that an error was thereby committed. It is argued that the testimony does not disclose that defendant sold, shipped, or used, or in any manner converted, any of said wheat, nor does it show any criminal intent. The testimony introduced by the state prior to the motion is contained in the bill of exceptions, an examination of which shows that E. T. Hall delivered to defendant in Marion County, Oregon, 204 bushels of wheat, receiving from him, as evidence of the deposit, the load checks hereinbefore set out, two of which erroneously contained the name of G. Hall; that the value

of the grain so deposited was about \$102, the storage charges of which for one year were 2½ cents a bushel; that about March, 1901, defendant informed Hall that there was no wheat in his warehouse, saying that he had a shortage of from 8,000 to 12,000 bushels, which had been accumulating for three or four years, caused by the shrinkage of the wheat. G. G. Swart, as a witness for the state, testified that he was employed by defendant in his warehouse and authorized by him to issue receipts for grain stored therein when Hall's wheat was received; that defendant shipped the wheat so stored, including that of Hall's, to Portland and Turner, Oregon, and to San Francisco, California, and that on March 28, 1901, there was no wheat remaining in the warehouse. E. T. Hall, as a witness for the state, testified that the wheat was deposited in the warehouse under an agreement that he would pay the customary storage charges, and should receive in return the same number of bushels of wheat, or the value thereof, in case he sold the grain to the defendant, and that he never sold it to him.

The wheat having been delivered to and accepted by the defendant, constituted a bailment, and any exercise of dominion over it by him, inconsistent with the claim of the owner, amounted to a conversion of the grain. The testimony having disclosed that defendant, instead of returning the wheat in compliance with the terms of the agreement, shipped it away, thereby necessarily negatives any permission secured from the owner to take it.

The fact of his having taken the wheat was established, if the jury believed Swart's testimony, from which they might infer the defendant's intent which accompanied the taking: Hill's Ann. Laws, § 771. The burden was imposed upon the state to prove every material allegation of the information beyond a reasonable doubt, and as a criminal intent is a necessary ingredient in all cases of

felony, it was incumbent upon the state to prove such intent. It would be a difficult task, in almost every instance, to secure a conviction in cases of felony, if the proof of a criminal intent depended upon direct testimony, for a person contemplating the violation of a public law rarely proclaims his purpose prior to the commission of the overt act. The motives that seemingly induce human action are not often discovered, except by deduction, which the reason of the jury makes from the proven facts that necessarily precede, are inseparably connected with, and naturally result from, the commission of the overt act, the *animus* of which is the subject of their inquiry. This being the only known method whereby a criminal intent can be ascertained, the law wisely permits the jury, upon proof of the commission of the overt act by the defendant, to deduce his intention from a consideration of all the circumstances reasonably connected therewith. We think the testimony introduced, if believed by the jury, who were the sole judges of its weight, was sufficient to prove that the wheat was shipped away by the defendant, and, that fact having been established, the jury were authorized to infer therefrom the intention of the defendant in connection with such conversion.

7. It is further contended in behalf of defendant that the testimony shows that the transaction between Hall and their client was a sale, and not a bailment, and, this being so, the court erred in not directing the jury to return the verdict desired. Upon this branch of the case Hall testified that he expected to sell the wheat stored in the warehouse to the defendant, if he would pay as much therefor as any other person, and that in depositing it he expected to receive in return the same number of bushels of wheat, or the value thereof, but that defendant did not have an option to purchase the grain so stored, nor did he sell it to him. We do not think the title to the grain passed by

the agreement entered into between Hall and the defendant in respect to storing it in his warehouse.

It is insisted by defendant's counsel that the testimony conclusively shows that in all the transactions involved in this case the defendant acted as and was a warehouseman, and, as he was charged with a violation of Section 1771, Hill's Ann. Laws, which was repealed, in respect to warehousemen, by the act of February 23, 1885 (Laws, 1885, p. 61), the information did not state facts sufficient to constitute a crime, and hence the court erred in not directing the jury to return a verdict of not guilty. It may have been that defendant sustained the relation of a warehouseman to other depositors of wheat, but, as such occupation is required to be evidenced by the issuance of receipts stating the condition and quality of the commodity, and the terms and conditions upon which it is stored (Hill's Ann. Laws, § 4201), and as the receipts issued to Hall did not comply therewith, it is certain that as to him defendant was not a warehouseman, and no error was committed in refusing to instruct the jury as requested. We do not wish to be understood as intimating, however, that an information would not lie for a violation of the provisions of the warehouse act when the deposit was evidenced by a receipt which failed to state the terms and conditions upon which the commodity was stored; nor to hold that Section 1771, Hill's Ann. Laws, was repealed by implication in so far as it relates to warehousemen.

8. The court, when overruling the motion to direct a verdict, and referring to the character of receipts required to be issued under the warehouse act, said, in the presence of the jury:

"It must be such receipt as is described in the first section. Now, suppose a man, although he is a warehouseman, gets hold of the grain of some person, and then ships it away, or converts to his own use, or destroys it, or does

anything which deprives the owner of his grain without his consent, can he come in and say, 'It is true, I took this grain, but I did not issue any receipt for it, and I did not have the consent of the owner, and this property does not come within the meaning of the warehouse act; but I am a warehouseman, so there is a sanctity around me which you cannot invade?' I do not think it is the intention of the statutes to do that. To hold that the fact that a man is a warehouseman protects him from a charge of larceny by bailee, or plain stealing, so that he could shield himself behind the warehouse act, is not the intent of the law. I think a man who gets hold of the property, no matter whether he is a warehouseman or anybody else when he gets hold of the property, and converts it to his own use, within the meaning of this statute against larceny by bailee, is liable."

Defendant's counsel having excepted to all that part of the language quoted commencing with the words "to hold," etc., the court replied: "I think that is the law. I do not intimate that the defendant did any of those things. That is for the jury to determine," whereupon defendant's counsel said, "That is the reason we except to it."

Invoking the rule adopted in *State v. Lucas*, 24 Or. 168 (33 Pac. 538), it is contended that the remarks of the court so excepted to invade the province of the jury, and, this being so, the judgment should be reversed. In the case to which attention is called the court said of the prosecuting witness, in the presence of the jury, "It does not follow that because a woman is lewd that it affects her veracity," and it was held that the remark invaded the province of the jury, who were the exclusive judges of the credibility of a witness. In the case at bar, however, it would appear that the language of the court was illustrative of a hypothetical case, and not applicable to the defendant; but, in any view of the case, the court having stated that the remarks did not refer to the defendant, we do not think he was prejudiced thereby. Thus, in *State v.*

McDaniel, 39 Or. 161 (65 Pac. 520), Mr. Chief Justice BEAN, in disposing of a similar contention, says: "The remarks of the court, however, were not made to the jury, but in passing upon the competency of evidence. In such a case the court has a right to use such language as is necessary to make its ruling understood, and in this case any error that may have been committed was, in our opinion, cured by the subsequent withdrawal of the objectionable words, and the instruction to the jury to disregard them."

9. Anna A. Humphreys, the defendant's wife, having appeared as his witness, and testified on direct examination that the signatures to the load checks, hereinbefore set out, were not in the handwriting of the defendant, but were appended by G. G. Swart and one Emmett, was asked on cross-examination: "At the time Swart and Emmett signed these load checks as you have stated, were they not both in the employ of the defendant, and authorized by him to receipt for and weigh wheat and issue these load checks in his name?" An objection to the question on the ground that it was not proper cross-examination having been overruled, and an exception allowed, the witness replied that Swart and Emmett were so employed at the time, and had authority from the defendant to issue load checks in his name. It is contended that the question so excepted to was not germane to any testimony given by the witness in chief, but was affirmative substantive evidence on the part of the state, and that the court erred in permitting her to answer it. It will be remembered that Mrs. Humphreys testified in her direct examination that Swart and Emmett signed her husband's name to the load checks, and, having done so, we think no error was committed in requiring her to answer the questions so propounded.

Exceptions were also taken by defendant's counsel to certain parts of the court's charge to the jury, and to its

modification of and refusal to give certain instructions requested; but upon an examination thereof we do not think any error was committed. It follows from these considerations that the judgment is affirmed. AFFIRMED.

Argued 4 May, decided 25 May, 1903.

MAYNARD v. OREGON RAILROAD CO.

[72 Pac. 590]

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INJURIES BY CARRIER—PROOFS AND ALLEGATIONS AS TO DAMAGES.

1. Under the rule that whenever the damages sustained do not necessarily arise from the act complained of, they must be specifically designated, a passenger suing for injuries sustained in a railway accident may show that one of his knees was skinned, his hip bruised, that he had pains in the neck, and that his legs would draw and cramp, under allegations of having been thrown down in the car, and bruised on the leg, and of having been wrenched and sprained in the back, whereby a severe contusion of the muscles and nerves resulted.

DAMAGES—ALLEGATIONS AND PROOFS—RAILWAY SPINE.

2. Under a complaint by a passenger for injuries, alleging that he was violently thrown down and greatly injured, being bruised on his leg, and his back being wrenched and sprained, whereby a severe contusion of the muscles and nerves resulted, and that by reason of such injuries he became sick and unable to perform labor, and his health was greatly impaired, and he was permanently disabled, proof of traumatic neurosis, or "railway spine," as it is sometimes called, resulting from concussion, or the shock in consequence thereof, or from fright, is inadmissible.

EVIDENCE—PREJUDICIAL ERROR.

3. In a suit by a passenger for injuries in which proof of traumatic neurosis, resulting from concussion, or consequent shock, or from fright, was inadmissible under plaintiff's complaint, plaintiff's expert witness testified that he found no injury of the spine itself, but only of the muscles outside. After detailing plaintiff's debilitated and nervous condition, and asserting that a number of things might have produced it, he was asked whether, if plaintiff had received a severe injury or sprain of the back, his condition would be the outcome, and answered that, if the sprain, or wrench, or contusion was sufficient, it would. He was then asked if there was a disease known as "railway spine," and the cause of it, and his answer showed that it might be produced by actual injury, together with fright and shock, or that it might be caused by a nervous shock and fright. He was then asked, "You say that you found him laboring under a nervous state—that is, his nervous system was shocked?" to which he answered, "His nervous system is very irritable and weakened." Another expert was asked whether a person thrown down in a wreck might receive a jar or shock that would injure his nervous system or spinal cord, but which would not at first appear to be severe, and might continue for some time before becoming manifest, and answered that he might. *Held*, that the admission of the evidence was prejudicial error, notwithstanding an instruction that damages must be limited to such as might naturally be attributable to the injuries alleged.

EXPERT TESTIMONY MUST BE BASED ON THE EVIDENCE.

4. Hypothetical questions to expert witnesses must be based on facts previously testified to, of which rule this case affords an example: A passenger suing for injuries testified that the collision threw him into a corner of the car, where

he struck something and fell on the floor; that he was thrown down pretty hard, and was hurt in the back, and had a sharp pain there after falling. Expert witnesses for plaintiff testified that they discovered no evidence of injury to his spine, except the inference from his nervous condition. *Held*, that a hypothetical question as to whether a person might receive, by being violently thrown down, or by any severe jar or shock in a wreck, a shock that would injure his nervous system and spinal cord, was unsupported in the evidence.

From Union: ROBERT EAKIN, Judge.

This is an action by H. Maynard against the Oregon Railroad & Navigation Co. to recover damages for a personal injury which plaintiff alleges he sustained October 3, 1902, by reason of the railway train on which he was being carried colliding with another in front, due to the carelessness and negligence of the defendant. *Inter alia*, it is alleged in the complaint that plaintiff "was violently thrown down in the car in which he was at said time a passenger, and was greatly injured, being bruised on his leg, and his back being wrenched and sprained, whereby a severe contusion of the muscles and nerves resulted; that by reason of the injuries so received the plaintiff became sick, and unable to perform labor since the third day of October, 1902, and his health greatly impaired, and is permanently disabled to perform labor or in any way attend to business, and has received other injuries, in all to his damage," etc. These allegations constitute the gravamen of plaintiff's cause of action, and, having secured a verdict and judgment thereon, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Cotton, Teal & Minor, Thos. H. Crawford*, and *James G. Wilson*, with an oral argument by *Mr. Crawford* and *Mr. Wilson*.

For respondent there was a brief and an oral argument by *Mr. Leroy Lomax*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion.

1. The errors relied upon for a reversal are based upon the admission of testimony, instructions given to the jury, and others asked on the part of the defendant and refused. Defendant's counsel first complain that plaintiff was permitted to show that he was "skinned on the knee and bruised on the right hip," that sharp pains extended into his neck, and that "his legs would draw and cramp"; and they insist that the complaint contains no allegations of any injuries such as these. They say (quoting from their brief): "It is not claimed in the complaint that plaintiff's knee was skinned or injured, or that his hip was bruised, or that his neck was injured, or that he had cramps in his legs as a result of the injuries received by him in the wreck." While these specific or exact injuries or symptoms of hurt are not set out and localized upon the person by the allegations of the complaint, it is manifest that they are such as might naturally be expected to arise or ensue from such as are alleged. It does not require an exaggerated stretch of reason to infer that a passenger had his knee skinned or his hip bruised from an affirmation that he was bruised on his leg, or that sharp pains extended to the neck, and that his legs would draw and cramp from a wrench of the spine, whereby severe contusions of the muscles and nerves resulted. Being such as might very naturally and consistently result from the injuries specified, it was proper to permit them to be shown. The general rule, as stated in *De Forest v. Leete*, 16 Johns. 128 (quoting from 1 Chitty on Pleading), is that "whenever the damages sustained do not necessarily arise from the act complained of, and, consequently, are not implied by law, in order to prevent the surprise on the defendant which otherwise might ensue on the trial the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it."

This rule was applied by Mr. Justice CAMPBELL in *Shadock v. Alpine Plank-Road Co.* 79 Mich. 7 (44 N. W. 158), to the exclusion of testimony showing fractures of the shoulder, arm, and hand, and a temporary sprain of the hip, not only producing temporary pain, but, as was claimed, permanent injury and some disability, under an allegation that plaintiff was bruised, hurt, and injured. Such conditions did not necessarily result from the injuries designated by the allegations of the complaint. Quite a different condition of things exists in this case. Those injuries or symptoms of hurt sought to be shown here might very naturally arise or result from such as were alleged to have been received by plaintiff, or at least they were not so remote and disconnected as to cause surprise, and a consequent disadvantage to the defendant in permitting their proof. There was no error in this respect.

2. The plaintiff, being called as a witness in his own behalf, testified among other things, that he was fifty-three years of age; that he was riding in the small room or smoker, and was in the act of getting on his feet when the collision threw him ahead into the corner of the car, where he struck something, and fell on the floor; that he was thrown down pretty hard; that he could not say whether he was standing up straight or just getting up, but thought he was just getting up; that he was hurt in the back, skinned on the knee, and bruised on the right hip; that he had a sharp pain in his back after falling—a sharp, cutting pain; that, after being hurt, he tried to work the best he could for a couple of days, but had to quit, and that his back was so lame at night he could hardly turn over in bed; that he had not been able to work since that time; that prior to the collision his health was good, so that he was able to do all kinds of manual labor; that since the injuries he suffered with a pain in his back; that it kept him in bed a good share of the time; that he

could get around, but could not work; and that this condition had continued since the injury to the present time. On cross-examination he testified that he first thought he was severely bruised and jammed, and would get over it in a few days; that it was during the second week after he came back that he tried to work; that when he was thrown down he struck on his head and hip, struck his head against something, and then went down on the floor; that he walked from the car to the depot with John Ross; that he did not make any complaint to him; that he thought at the time that it was a severe wrench or bruise, but that he would get over it all right; that he had never had any trouble with or injury to his back theretofore, never suffered with his back with lumbago or other trouble; and, on further examination in chief, that he weighed on October 2d, before he was injured, 162 pounds, but that about two weeks prior to his examination (February 18, 1903,) he weighed about 139 pounds; that after the collision, and prior to consulting Doctor Ewin, he had pains in his back—sharp pains running up and down his back and neck; that when he was first thrown on the floor there was a sharp pain in his back, and after that he felt more of a numbness; that these pains would catch him in his back, and run up and down, and his limbs would draw and cramp; that the shooting pains he spoke of did not commence to be very severe until about a couple of weeks—about the time he went to Doctor Cromwell—but that it hurt him all the time in the back.

Doctor Ewin, being called, testified, in substance, that he first began treating plaintiff November 14th; that he made a careful examination of him at the time as to his condition and health; that he found he had some tenderness in the back and left hip, considerable tenderness in the spinal column, and some rigidity of the muscles of the back; that he found no indications of any bruising or any

discoloration of the skin; that he learned from him that he had been suffering for several days or weeks from pain and contraction of the muscles of his legs and back at night, loss of sleep and appetite, shooting pains through his back and the back of his head, going down to his feet, and a twitching of the muscles of the legs and back. The following question was then propounded: "I will ask you to state this, doctor: Did you find an injured condition of the spine in any way during your examination?" to which he was permitted to answer, over objection, "I found no injury of the spine proper; only the muscles outside." The witness further testified, over objection, that from the present appearance of the man he was very nervous, weak, and debilitated generally; his hands were unsteady, and his walk and all his deportment was that of a person who was very nervous, and very much weakened; that a number of things might have produced this condition; that at the present time his condition is somewhat improved in a general way; that the nervous effects are not so pronounced, and he is better nourished in the way of taking food, sleeps better, and does not have the severe muscular cramping, but there is a weakened and debilitated condition of the nervous system, and that the seat of plaintiff's trouble seems to be in his nervous system—in the spinal column. Thereupon witness was interrogated and answered as follows: "I will ask you to state this, doctor: If a party or if a plaintiff should have received in a collision a severe wrench of the back, or sprain of the back, or if he should receive a severe wrench of the back from any cause, would the result, or the conditions you find this plaintiff in be the outcome or results of that? A. In the event that the sprain or wrench or contusion of the spinal column is sufficient, or a severe sprain of the nerves or spinal cord, it would. Q. Doctor, is there a disease known to the medical profession known as the 'railway spine'?

A. There is a condition that has been termed railway spine.

Q. Well what is that caused by, doctor? A. Railway spine is a condition, as ordinarily termed, that frequently happens in severe railroad wrecks, where an individual may be actually injured severely or more or less mildly, and that, taken together with the fright that usually accompanies it, and the shock, and even where the individual is not injured physically, and there is only a nervous shock, that with the scare or fright makes up what is called railway spine, or the conditions resulting from that. * * Q. Now,

in your examination of the plaintiff, did you find that—state whether or not you found that his back had been wrenched or sprained in any way? A. I found no indication conclusive as to that point at all. * * Q. You could

not say, then, by your examination of the plaintiff, whether or not he had ever received a severe wrench in the way of a wrench or sprain of his back, could you? A. No, sir.

There were no indications of that. I could not say what his condition was from the indications I found. Q. You say that you found him laboring under a nervous state; that is, his nervous system was shocked. Isn't that the case?

A. His nervous system is very irritable and weakened. That is the condition I find him in."

Doctor Biggers was then called, and testified to the same effect, in substance, as Doctor Ewin, as to the plaintiff's physical condition, and, among other things, that he was unable to find any objective evidence whatever of spinal injury. Thereupon the following question was propounded to him: "Now, doctor, I will ask you if it is not a fact that a party might receive, by being violently thrown down, or by receiving any severe jar or shock such as in a wreck or collision where a train has struck any object with great force, or anything of that kind, is it not a fact that any party might receive a shock that would injure his nervous system and his spinal cord, and that injury

might not be severe, and might continue for some time before it would make itself manifest, or anything of that kind?" to which he answered, over objection: "Yes, that is correct. There might be a spinal injury that would develop in the speck condition—that is, in the pus adjacent to the nerve tissue—and would manifest itself after the injury, and progress worse. These cases generally progress worse, and usually terminate fatally." There was other testimony by medical practitioners of the same nature, but the foregoing is ample to indicate the basis for the questions presented.

It is first insisted that the question as to whether or not plaintiff was afflicted with railway spine as a result of a nervous shock or fright sustained at the time of the collision is beyond the scope of the complaint; and, second, that the hypothetical question put to Doctor Biggers was not proper, as not being based upon facts in evidence. Of these in their order.

Medical science treats of a condition currently denominated "railway spine," or, in a more technical sense, "traumatic neurosis." It is latterly denied by strong authority that any such a malady exists as a concussion of the spine or spinal cord, which term is also often used as a synonym for railway spine, but that the symptoms which were supposed to indicate a concussion of the spine are but indications of a concussion of the brain, which may involve a psychic as well as a physical injury, one or both. Such a condition as traumatic neurosis may, it is said, result from actual lesion of the vertebral column, accompanied by immediate and definite signs of such lesion; but it may also result, according to medical science, from a nervous shock or sudden fright, involving a psychological condition as well as a nervous derangement and impairment, where there are no outward physical or objective signs or indications of physical lesion of any character.

It is clear that evidence relative to both phases of this peculiar disorder or malady, as it may have affected the plaintiff, has gone to the jury. The question, therefore, whether the complaint will admit of so broad a range of investigation is fairly presented. Unlike the question first discussed, railway spine, or traumatic neurosis, is not a sequence or result that follows as of course, or may, within reasonable inference, from a bruise on the leg, a wrench or sprain of the back, or contusion of the muscles and nerves. Such an affliction or malady may or may not result or spring from injuries of that nature, dependent upon the seriousness or severity of the injuries, and it is not, therefore, necessarily consequent. But it may arise from another and entirely distinct source—that is, from a concussion, followed by a shock of such proportions as vitally to affect and impair the nervous system, or a sudden fright, producing psychic or mental traumatism (“trauma” meaning a wound, and is generally used as synonymous with “injury”), which may lead to a multitude of derangements and suffering, and this without lesion of the nerves or contusion apparent objectively. So that the malady arising from this latter source could not, by any sort of gerrymandering or logic, be said to spring from a sprain, bruise, or contusion, and the like. It would be absurd to so contend.

A shock is defined by Charles L. Dana, M. D., as a sudden depression of the vital functions, especially of the circulation, due to the nervous exhaustion following an injury or a sudden violent emotion, resulting either in immediate death or in prolonged prostration, and is spoken of as being either corporeal or psychical, relating respectively to the vital powers and the emotions of the mind. Concussion, as applied to the brain, is a jarring of the brain substance without laceration of its tissue, or with only microscopical laceration. As applied to the spine, if it still be admitted

that such a condition may exist, is meant a condition of the spinal cord produced by a violent shock: "A System of Legal Medicine," vol. 2, pp. 297, 298. Again, the learned author says: "Concussion is the physical jar; shock is the effect. Shock resulting from concussion is called 'corporeal'; but almost the same class of symptoms can be produced by great emotion, and this form of shock is called 'psychical'": "A System of Legal Medicine," vol. 2, pp. 303, 304. Now, a concussion producing a shock without lesion, or a fright producing great emotion, leading to serious affliction or suffering, is quite a different thing from a sprain or contusion of the muscles and nerves, which might or might not lead to the same deleterious result. The latter is practically what is charged in the complaint; not the former. Having alleged the latter and omitted the former, the defense would naturally not prepare to meet the conditions, as it otherwise would where it has been led to believe that the plaintiff is relying for recovery wholly upon injuries produced by physical sprains, bruises, and contusions. The disorder being frequently insinuate in its progress and development, and subject to arise from a number of causes, it would seem that a party called upon to defend against its consequences should be apprised by appropriate allegations of the cause relied upon to produce it, and it would be misleading and vexatious to allege one cause and be permitted to prove another. We think, therefore, the complaint is insufficient to admit of proof of railway spine, or traumatic neurosis, arising or resulting from concussion, or the shock in consequence thereof, or from fright.

3. Now, if we follow the testimony, it is very easy to see how injuriously the defendant may have been affected by the mode in which the plaintiff was permitted to proceed in the introduction of his testimony. Doctor Ewin testified that he "found no injury of the spine proper; only

the muscles outside." Then, after detailing plaintiff's debilitated and nervous condition, and asserting that a number of things might have produced it, he was asked, if the plaintiff had received in a collision, or from any cause, a severe injury or sprain of the back, whether the condition he found him in would be the outcome or result of that. He answered, "In the event that the sprain or wrench or contusion of the spinal column is sufficient, or a severe sprain of the nerves or spinal cord, it would." Thus far there could be no hurt to the defendant. Then he was asked point blank if there was a disease known to the medical profession as "railway spine." Having answered in the affirmative, he was asked the cause of it, and his answer revealed that it might be produced by an actual injury, severe or more or less mild, together with the fright and the shock that usually accompanies it; and, further, that it might be produced where the individual is not injured physically, and there is only a nervous shock with a scare. He then again reiterates that he found no indications that plaintiff had ever received a severe injury in any way, or wrench or sprain of the back, and that he could not say what his condition was from the indications found. This was followed by the inquiry, "You say that you found him laboring under a nervous state; that is, his nervous system was shocked. Isn't that the case?" to which he answered: "His nervous system is very irritable and weakened. That is the condition I find him in." Following in the wake of this, Doctor Biggers was asked, in effect, whether or not a person, by being thrown down in a wreck or collision, might receive a jar or a shock that would injure his nervous system or spinal cord, which injury might not at first appear to be severe, and might continue for some time before making itself manifest, and answered that he might. So that here was manifest a purpose to press upon the attention of the jury the results

that might arise from a shock to the nervous system alone, without personal injury, or a fright in conjunction with such as might naturally arise from the physical injuries alleged in the complaint, and the procedure was surely harmful to the defendant. It is true that by instruction No. 2 the jury was very properly limited in its findings to such damages as might naturally be attributable to the injuries alleged. But the injurious testimony was not withdrawn, and, for aught the court may know, influenced the verdict returned.

4. Further than this, there was no such fact in evidence as that the plaintiff received a severe jar or shock upon which to base the hypothetical question put to Doctor Biggers. The plaintiff himself failed to testify to such a circumstance, and the physicians failed to establish it, except as an inference from the condition in which they found the patient, and it was error to permit the question to be answered: 8 Ency. Pl. & Pr. 757; *State v. Anderson*, 10 Or. 448; *Bomgardner v. Andrews*, 55 Iowa, 638 (8 N. W. 481); *Guetig v. State*, 66 Ind. 94 (32 Am. Rep. 99); *Quinn v. Higgins*, 63 Wis. 664 (24 N. W. 482, 53 Am. Rep. 305); *Reber v. Herring*, 115 Pa. 599 (8 Atl. 830); *Rowe v. Such*, 134 Cal. 577 (66 Pac. 862, 67 Pac. 760); *Fuller v. City of Jackson*, 92 Mich. 197 (52 N. W. 1075).

Further errors have been assigned, but, as the case must go back because of those referred to, it is deemed unnecessary that we should consider them now, as the same questions are not likely to arise again. The cause will be reversed, and remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 25 May, 1903.

BELKNAP v. WHITMIRE.

[72 Pac. 589.]

PARENT AND CHILD—CONTRACT OF LATTER FOR NECESSARIES.

1. Children are liable for necessities furnished to an indigent parent at their special request just as they are liable on any other contracts, they may make, though they may not be liable for necessities furnished without a request, as at common law there was no legal obligation on a child to support its parent.

STATUTORY LIABILITY OF CHILD TO SUPPORT PARENT.

2. The statutory method of enforcing the liability of a child for the support of its indigent parent is exclusive, and where such claims are made under the statute the child can be held liable only in the manner there provided.

EFFECT OF JOINT GENERAL DEMURRER.

3. A joint general demurrer by several parties for insufficiency should be overruled if the pleading is good against any one of them.

From Grant: MORTON D. CLIFFORD, Judge.

This is an action by V. C. Belknap against Thomas and Frances Whitmire to recover for professional services alleged to have been rendered by plaintiff, and for goods, wares, and merchandise alleged to have been sold and delivered by his assignors, to defendants and their mother. The facts, as appear from the complaint, are that the defendants are brother and sister, the latter a minor of the age of seventeen years; that their father died in July, 1890; that thereafter, until the death of the mother, in March, 1901, she and the defendants continued to live together as one family; that the mother was during all the time without property or means of support, and, by reason of continuous bodily infirmity, was unable to work and support herself or her children, but the defendants were and now are equal owners of property of the value of \$1,600, and by reason thereof were and now are of sufficient financial ability to furnish and pay for necessities for the support of themselves and their indigent mother; that between sundry dates after the death of the father, and prior to the death of the mother, the plaintiff and his assignors rendered professional services, and furnished drugs, medicines, and other goods, wares, and merchandise, to the

defendants and their mother, the cost of which remains unpaid in part. The gist of the allegations of the several causes of action is substantially the same, and it will be sufficient for the purposes of this case to quote those of the plaintiff, which are as follows:

"Plaintiff alleges that on and between the 14th day of March, 1896, and the 2d day of March, 1901, both dates inclusive, in Grant County, State of Oregon, the said defendants, and each thereof, became indebted to the plaintiff in the sum of \$1,117 for medical and professional services rendered, and medicines and drugs furnished, as necessaries, to the said defendants, and each thereof, and to their poor, indigent, and invalid mother, F. A. Whitmire, while living together as aforesaid, at the special instance and request of defendants, and each thereof, and of the said F. A. Whitmire, and that for convenience only, and with the knowledge and consent of defendants, and each thereof, the account therefor was kept in the name of F. A. Whitmire, and that said defendants, and each thereof, then and there promised and agreed to pay the same; that the said medical and professional services rendered, and medicines and drugs furnished, to defendants and their mother by plaintiff as aforesaid, were and are necessaries suitable to the station and condition in life of the said defendants, and each thereof, and of their said mother, and the price and value charged therefor was and is just and reasonable; that the said account of \$1,117 has not been paid, nor any part thereof, except the sum of \$27.50 paid on the 5th day of October, 1896, and the further sum of \$219.80 paid on the 1st day of March, 1901, and there is now due and owing plaintiff from defendants, and each thereof, on said account, the sum of \$869.70, with interest thereon at the rate of 6 per cent per annum from the 2d day of March, 1901."

A demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action, was sustained. The plaintiff refused to plead further, and a judgment was rendered against him for costs and disbursements, from which he appeals.

REVERSED.

For appellant there was a brief over the name of *Cattanach & Wood*.

For respondents there was a brief and an oral argument by *Mr. Victor G. Cozad*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion.

1. Although the complaint alleges that the professional services rendered by the plaintiff, and the goods, wares, and merchandise furnished by his assignors, were necessities suitable to the station and condition in life of the defendants and their mother, the action cannot be regarded as one brought for necessities furnished to and upon the contract of a minor. If they are liable on such a contract, they must be sued separately for the value of the necessities furnished to each, instead of which the action is brought against them jointly to recover for services rendered, and goods, wares, and merchandise furnished, to them and their mother. The argument of defendants' counsel is confined chiefly to a discussion of the question as to when and under what circumstances children may be charged with the support of their indigent parents, and whether they can be held liable on a promise to pay for past support and maintenance voluntarily furnished by third persons. The complaint, however, alleges that the plaintiff's professional services were rendered, and the goods, wares, and merchandise furnished, by his assignors to the defendants and their mother, "at the special instance and request of defendants, and each thereof," and that they "then and there promised and agreed to pay the same." Whatever the liability of a child may be under other circumstances, there can be no question but that he may be charged for goods, wares, and merchandise furnished a parent at his special instance and request, as upon any other contract made by him: *Lebanon v. Griffin*, 45 N. H.

558; *Becker v. Gibson*, 70 Ind. 239. At common law there is no legal obligation resting on a child to support his parent, however strong the moral duty may be: *Schouler*, Dom. Rel. (5 ed.), § 265; *Gray, Adm'x v. Spalding*, 58 N. H. 345. Hence the law does not infer a promise by him to pay for necessities furnished to an indigent parent: *Edwards and Wife v. Davis*, 16 Johns. *281; *Lebanon v. Griffin*, 45 N. H. 558; *Becker v. Gibson*, 70 Ind. 239; *Stone v. Stone*, 32 Conn. 142. But when the support is furnished at his request, he becomes bound therefor, the same as upon any other contract.

2. In this and in many other states children are made liable by statute for the support and maintenance of their parents, when poor and unable to maintain themselves: B. & C. Comp. §§ 2654, 5254. The statutory procedure provided for enforcing the duty thus enjoined is exclusive, and the child can be held liable only in the manner provided. The statute does not authorize a volunteer who has afforded relief to an indigent party to maintain an action therefor against a child of such party as upon an implied contract arising merely from the moral duty which the child owes to support the parent: *Gray, Adm'x v. Spalding*, 58 N. H. 345; *Edwards and Wife v. Davis*, 16 Johns. *281; *Dawson v. Dawson*, 12 Iowa, 512; *Condon v. Pomeroy-Grace*, 73 Conn. 607 (48 Atl. 756, 53 L. R. A. 696). And it has even been held that the statutory liability is not a sufficient legal consideration to support a promise to pay for past expenditures made by a third person for such purpose: *Nine v. Starr*, 8 Or. 49; *Cook v. Bradley*, 7 Conn. 57 (18 Am. Dec. 79); *Dawson v. Dawson*, 12 Iowa 512; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Trimble v. Rudy* (Ky.), 53 L. R. A. 353, note. Whatever the rule may be upon this last point, the complaint herein is sufficient, because it alleges that the support and maintenance was furnished at the special in-

stance and request of the defendants, and each of them. It therefore states a good cause of action upon contract against the defendant Thomas Whitmire, even if the other defendant, who was a minor, may for that reason avoid her contract: *Hamm v. Basche*, 22 Or. 513 (30 Pac. 501); *Tillamook Dairy Ass'n v. Schermerhorn*, 31 Or. 308 (51 Pac. 438).

3. The demurrer, being joint, should have been overruled: *Boyd v. Mutual Fire Assoc.* (Wis.), 90 N. W. 1087, 1093; *Hirshfeld v. Weill*, 121 Cal. 13 (53 Pac. 402).

The judgment of the court below is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 12 January, 1903.

STATE v. DURPHY.

[71 Pac. 68.]

POLYGAMY—ALLEGING MARRIAGE RELATION AS EXISTING.

1. Under B. & C. Comp. § 1918, providing that if any person having a former husband or wife living shall marry another person, or live and cohabit with another person as husband or wife, such person shall be deemed guilty of polygamy, an information for that offense must show that the former spouse was still living and at the time stated still was spouse to the person charged.

INFORMATION FOR POLYGAMY—DUPLICITY.

2. An information for polygamy, under B. & C. Comp. § 1918, charging that the accused, having a wife, feloniously married another woman in Illinois, and thereafter feloniously cohabited with her in Oregon, does not charge two crimes,—the second marriage and cohabitation,—for a marriage in another state would not be an offense against the laws of Oregon.

CONSTRUCTION OF INFORMATION FOR POLYGAMY.

3. An information charging that a stated person married a woman in Massachusetts, "and, while she was still his wife," feloniously married another woman in the State of Illinois, and subsequently cohabited with the latter in Oregon, does not charge the crime of polygamy in Oregon, inasmuch as the phrase, "and while she was still his wife," refers to the time of marriage, and not to the cohabitation in Oregon: *State v. Abrams*, 11 Or. 160, distinguished.

From Multnomah: ALFRED F. SEARS, JR., Judge.

The defendant, Bradley F. Durphy, was convicted of the crime of polygamy upon an information, the charging part of which is as follows:

"The said Bradley F. Durphy, on the 15th day of March, A. D. 1874, in the County of Plymouth, State of Massachusetts, did marry one S. S. Bosworth, and her the said S. S. Bosworth then had for his wife, and the said Bradley F. Durphy, being so married as aforesaid to the said S. S. Bosworth, afterwards and during the life of S. S. Bosworth, and while she was still his wife, did on the 20th day of July, A. D. 1887, unlawfully and feloniously marry one Margaret Ryan, in the County of Cook, in the State of Illinois, and thereafter he, the said Bradley F. Durphy, moved with the said Margaret Ryan to the City of Portland, County of Multnomah, State of Oregon, and did in said City of Portland, County of Multnomah, State of Oregon, on the 15th day of August, A. D. 1898, and for a long time prior thereto, then and there being, then and there unlawfully and feloniously live and cohabit with her the said Margaret Ryan as his wife, the said S. S. Bosworth being then alive;" and from the judgment which followed he appeals.

REVERSED.

For appellant there was a brief over the names of *Cicero M. Idleman*, *Franklin P. Mays*, and *Robert W. Galloway*, with an oral argument by *Mr. Idleman* and *Mr. Mays*.

For the state there was a brief and an oral argument by *Mr. Geo. E. Chamberlain*, District Attorney, and *Mr. George H. Durham*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

1. At the trial of the cause there was an objection interposed on the part of the defendant to the introduction of evidence by the prosecution upon two grounds: (1) That the information charges two crimes; and (2) that it does not charge any crime,—which was overruled, and at the conclusion thereof the court was requested to direct the jury to return a verdict of not guilty, but without success, and error is predicated upon the action of the court in these particulars. By these proceedings the sufficiency of the information is challenged, and we will direct our inquiry

to the single question as to whether a crime is charged therein, as it is, in the view we have taken of the matter, decisive of the case. The strong insistence of the defendant is that the information is deficient in that it is not alleged that at the time the defendant is said to have lived and cohabited with Margaret Ryan, in Multnomah County, State of Oregon, the said S. S. Bosworth was then his wife. The state conceding the information to be inartistically drawn, contends that a portion of it should be stricken out as surplusage, namely, the words and figures, "did on the 20th day of July, A. D. 1887, unlawfully and feloniously marry one Margaret Ryan, in the County of Cook, in the State of Illinois, and thereafter he, the said Bradley F. Durphy, moved with the said Margaret Ryan to the City of Portland, State of Oregon, and"; and that what remains would be all that is essential to state a crime. The information would then read, after stating defendant's marriage with Bosworth, as follows: "And the said Bradley F. Durphy, being so married as aforesaid to the said S. S. Bosworth, afterwards and during the life of the said S. S. Bosworth, and while she was still his wife, did in said City of Portland, County of Multnomah, State of Oregon, on the 15th day of August, A. D. 1898, and for a long time prior thereto, then and there being, then and there unlawfully and feloniously live and cohabit with her, the said Margaret Ryan, as his wife, the said S. S. Bosworth being then living, contrary to the statute," etc. Any person having a former husband or wife living who shall marry another person, or live and cohabit with another person as husband or wife, is deemed guilty of polygamy: B. & C. Comp. § 1918. It is indispensable under the statute to show that the former husband or wife, as the case may be, is not only living, but is still, or was at the alleged time of the commission of the offense, the husband or wife of the accused, for it may have

transpired that the parties were in the meantime lawfully divorced, and the fact should so appear in the information: *State v. McCrum*, 38 Minn. 154 (36 N. W. 102).

2. Now, to analyze the information, it is manifest that the pleader did not intend to charge a crime by alleging that the defendant did unlawfully and feloniously marry Margaret Ryan in the State of Illinois, because the act would not be an offense against this commonwealth, but that the gravamen of the information is contained in the allegation that he lived and cohabited with Margaret Ryan, in Multnomah County, State of Oregon, and hence the information does not charge the commission of two offenses. The former allegation was meant no doubt as an inducement to the latter, by showing the second marriage of the defendant, and to whom, namely, Margaret Ryan, the latter making reference to her as "the said Margaret Ryan." The words, "and while she (S. S. Bosworth) was still his wife," relate, and were so intended by the pleader, to the time of the defendant's marriage to Margaret Ryan, in the State of Illinois, and not to the time of his living with her in said County of Multnomah. So that, if the inducement is to be eliminated, these words must go with it, and the information would then be undoubtedly bad. It would be unwarrantable, it seems to us, to thus change the relation of a clause of the information, thereby giving it an entirely different signification; or, rather, to so transpose the clause with reference to the context as to make it apply to the gravamen of the offense, when in its natural position, and as designed by the pleader, it could have no such relevancy. Such a rule would be promotive of irregularity, and perhaps injustice, as it might be misleading as to the specific crime charged, and the defendant be left without adequate preparation for his defense. Hence we are impelled to hold that the information does not charge the crime of polygamy under the statute. We have examined

the case of *State v. Abrams*, 11 Or. 169 (8 Pac. 327), and others cited by the state, but they do not reach the vice attending the present information.

The judgment of the trial court will, therefore, be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

REVERSED.

Decided 2 June, 1903.

HORSEMAN v. HORSEMAN.

[72 Pac. 606.]

43	83
43	158

PUBLIC LANDS—AGREEMENT TO CONVEY HOMESTEAD.

1. A contract to convey the land that he has entered under the laws of the United States made by a homestead claimant before the issuance of a patent is void and unenforceable in the courts, since it is a violation of the public policy of the national government, as indicated by Sections 220 and 221 of the Rev. Stat. U. S., which require that lands entered as homesteads must be for the purpose of actual settlement by the claimants, and that the patent shall issue only on the affidavit of the entrymen that no part of the land has been alienated.

SEVERABILITY OF CONTRACT—SPECIFIC PERFORMANCE.

2. A contract to convey for a fixed total sum certain specified real and chattel property, together with the land covered by a homestead entry on which final proof had not been made, is an entire indivisible contract, and enforceable only as a whole.

ENFORCEMENT OF PARTLY VOID CONTRACT—EQUITY.

3. Equity will not undertake to aid either party to a void contract in any way, but will leave them just where they have placed themselves.

RESTORING PARTIES TO THEIR ORIGINAL POSITIONS.

4. In enforcing the rule that parties to contracts against public policy shall be left where equity finds them it is sometimes necessary to enter a judgment against one of the parties for the value of property received from the other during the litigation, and equity will use appropriate means and orders to restore all the parties to their original positions before dismissing them.

From Umatilla: W. R. ELLIS, Judge.

This is a suit by J. A. Horseman and Eugene Corley against Chas. H. Horseman. The complaint sets up the execution on February 17, 1898, by plaintiffs to defendant, of two promissory notes, for \$1,000 and \$2,250, respectively, payable one and two years after the date thereof, with interest at 10 per cent per annum, said notes being given for the balance of the purchase price of defendant's interest in all the horses, cattle, and real property then

owned by the firm of Horseman Brothers, composed of the plaintiff, J. A. Horseman, and the defendant, Charles H. Horseman; that defendant delivered to plaintiffs all his interest in such personal property, and conveyed to them all his interest in the real property, except two quarter sections, namely, the southwest quarter of section 19, and the northwest quarter of section 30, township 3 south, range 30 east, Willamette Meridian; that, to secure the payment of said promissory notes, the plaintiffs at the same time executed and delivered to defendant a chattel mortgage upon 213 head of stock cattle, and also mortgages upon all of the deeded lands theretofore belonging to the firm; that thereafter it was agreed by and between the plaintiffs and defendant that if at any time the plaintiffs could sell any of the cattle covered by the chattel mortgage, and thereby raise sufficient funds, the defendant would accept the amount due on such notes, with accrued interest to the date of payment, surrender the same, and cancel the mortgages, and that for such purpose the plaintiffs were authorized to dispose of any and all of said cattle; that thereafter the plaintiffs sold sufficient of such cattle, together with other cattle belonging to them individually, to realize enough money to pay said notes, and on the seventeenth day of May, 1898, tendered to the defendant the full amount thereof, with interest accrued to that date, which defendant refused to accept, and did then and does now refuse to surrender said notes or cancel the mortgages, or to convey to plaintiffs the said two quarter sections of land above described, although demanded so to do. The prayer is for a decree requiring a surrender of the notes and the cancellation of said mortgages upon payment of the principal sum due thereon and interest to May 17, 1898, and the execution and delivery by defendant to plaintiffs of a proper conveyance of the said two quarter sections of land, and for general relief. The answer admits

the execution of the notes and mortgages, but denies that defendant sold or agreed to convey the southwest quarter of section 19, or the northwest quarter of section 30, and prays damages for the alleged conversion of some horses, which it avers were excepted from the sale. The trial court's findings of fact conformed closely to the allegations of the complaint, in addition to which it found that by its order of October 23, 1899, the clerk of the court was appointed receiver to take charge of the money, notes, and mortgages mentioned in the complaint; that there are in his custody \$2,635.40, the note for \$2,250, and the mortgages; that, of the sum of \$2,700 originally deposited in the First National Bank of Pendleton, and delivered by it to the clerk, \$2,271.25 are the proceeds of the sale of the cattle described in the chattel mortgage. It thereupon decreed a dismissal of the suit, without prejudice; that the clerk indorse upon the said note of \$2,250 the sum of \$2,271.25, and thereupon deliver said sum and the notes, and mortgages made to secure the same, to the defendant. From this decree the plaintiffs appeal. MODIFIED.

For appellants there was an oral argument by *Mr. Thos. G. Hailey*, with a brief over the names of *T. G. Hailey* and *John J. Balleray*, to this effect:

1. A contract made by a homestead claimant after entry and after the required residence thereon, to convey his homestead after final proof, is valid: Rev. Stat. U.S. § 2291; *Knight v. Leary*, 54 Wis. 459 (11 N. W. 600, 605); *Townsend v. Fenton*, 30 Minn. 528 (16 N. W. 421).

2. The word "alienate" has a technical legal meaning, and any transfer of real estate short of a conveyance of the title is not alienation: 2 Am. & Eng. Ency. (2 ed.), p. 61, note; *Gould v. Head*, 41 Fed. 245; *Hammel v. Queen's Ins. Co.* 54 Wis. 72 (11 N. W. 349, 72 Am. Rep. 1); *Union Ins. Co. v. Barwick*, 36 Neb. 223 (54 N. W. 519, 521).

3. A timber-culture claimant may contract before final proof to sell his claim: *Adams v. Church*, 37 Or. 355 (61 Pac. 639).

4. It is not generally necessary that the vendor be able to furnish a good title at the time of the contract if he be able to do so at the time of the suit: *Dodson v. Hayes*, 29 W. Va. 577 (2 S. E. 424); *McKinney v. Jones*, 55 Wis. 39 (12 N. W. 381); *Arnett v. Smith*, 11 N. D. 55 (88 N. W. 1041).

For respondent there was an oral argument by *Mr. A. D. Stillman* and *Mr. W. M. Pierce*, with a brief to this effect:

In February, 1898, the defendant was holding as entryman 160 acres under the homestead laws (Rev. Stat. U. S. §§ 2290, 2291) of the United States. He had not even attempted to make final proof. There is no evidence that he had resided upon it the requisite length of time or made the required improvements. A contract made at that time to execute a conveyance of the land homesteaded would be null and void as against public policy: *Clark v. Bayley*, 5 Or. 343; *Warren v. Van Brunt*, 19 Wall. 646; *Robinson v. Jones*, 31 Neb. 20 (47 N. W. 480); *Oaks v. Heaton*, 44 Iowa, 116; *Marshall v. Combs*, 48 Ark. 362 (3 S. W. 188); *Mellison v. Allen*, 30 Kan. 382; *Anderson v. Carkins*, 135 U. S. 483 (10 Sup. Ct. 905); *Damrell v. Mayer*, 40 Cal. 166; *Huston v. Walker*, 47 Cal. 484.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

It is established by the evidence adduced that on and prior to the sixteenth day of February, 1898, the plaintiff J. A. Horseman and the defendant Charles H. Horseman were partners, engaged in the stock business, under the firm name of Horseman Bros.; that the firm owned a large number of horses and cattle, and was in possession and occupancy of a large tract of land used in connection with the business, and on that date the defendant agreed, for

the consideration of \$4,250, to sell, transfer, and convey all his interest in the partnership property, including stocks and lands, to the plaintiffs; that G. L. Horseman acted as the agent of plaintiffs in making the agreement, and to bind the bargain he paid defendant \$40, and took his receipt therefor, as follows:

“Pendleton, Oregon, Feb. 16, 1898.

Rec'd of G. L. Horseman forty dollars (\$40⁰⁰/₁₀₀) as part payment on the property of the interest of C. H. Horseman in the Horseman Bros. estate of which I, G. L. Horseman, agree to pay \$4,250⁰⁰/₁₀₀ for after the money that is all ready on hands is divided $\frac{1}{2}$ and $\frac{1}{2}$.

C. H. HORSEMAN.”

It is also established that on the next day Charles H. Horseman executed to plaintiffs a deed to certain lands that stood in his name individually, but were in reality partnership property, and the plaintiffs executed and delivered to him the notes and mortgages mentioned in the complaint, \$1,000 of the agreed consideration being paid in cash before the exchange of such instruments; that it was agreed on the day the receipt was given that the deferred payments were to be made on or before one and two years after date, to suit the convenience of the purchasers, but that G. L. Horseman, the agent, omitted to state this condition to his attorney, and the notes were drawn payable one and two years, respectively; that on the 17th, and prior to the exchange of the papers, the mistake was discovered, and that it was then mutually agreed that the makers should be permitted to discharge such notes at any time the cattle covered by the chattel mortgage could be sold to realize the funds, by paying the principal and interest accrued to that time, and for that purpose defendant authorized the plaintiffs to dispose of the cattle. As to this latter agreement the parties are not in accord, the defendant denying it *in toto*, but G. L. Horse-

man testifies positively in affirmation of it, and the defendant undeniably assented to the sale of the cattle covered by the mortgage, so that money could be realized upon them; and we are firmly of the opinion that such an agreement was entered into with reference to the sale of the stock and discharge of the notes, as stated.

It is further shown that the cattle, or a part of them at least, were sold on and prior to the seventeenth of May, the proceeds of which, together with \$1,160 realized from other cattle belonging to plaintiff Corley individually, were sufficient to pay the notes and accumulated interest to that date. But when G. L. Horseman, acting as the agent of plaintiffs, indicated their readiness to pay, the defendant refused to accept the principal and interest to that time, or to surrender the notes, until the face thereof, with interest to the dates of their maturity, was fully paid. G. L. Horseman testifies that he made a tender of the amount due according to his understanding in full payment, but on condition that the defendant execute and deliver to the plaintiffs a deed to his homestead, consisting of the northwest quarter of section 30, and the defendant admits that a tender was made to Mr. Wade, his agent, but declined by his direction, his instructions being to accept nothing less than the face of the notes in payment thereof. Mr. Wade, the cashier of the First National Bank of Pendleton, testifies that the defendant left the notes with the bank; that a few months afterward G. L. Horseman, representing the plaintiffs, and the defendant came into the bank, the former saying he wanted to pay the notes; that a dispute arose between them relative to the interest, the defendant insisting upon the full amount according to the tenor of the notes, although they were not then due. He further says, employing the language of the witness: "I counseled with them some, and they finally agreed that, until they could settle it otherwise, that they would leave this certain sum

of money, the face of these two notes and interest for the full time, in my hands in escrow to take up these notes as they came due. One of these notes afterwards came due, and I paid to Charles Horseman the amount of the money and gave the note to George Horseman, and took Charles Horseman's receipt for the money. The rest of the money was afterwards turned over to the county clerk on order of the court." Then being asked, "Mr. Wade, what instruction did you get from George at the time he left the amount of money in there, as you say, to pay the full amount of the note according to tenor?" he answered as follows: "He told me the understanding was between the two I was not to turn the money over to Charlie Horseman until they came due, unless otherwise instructed. I was to hold them until that time, and was not to pay any of it until it came due, and, if they agreed on a compromise of any kind, they would let me know."

The principal dispute in the evidence is whether the homestead of the defendant and another tract of land, being the said southwest quarter of section 19, upon which defendant had filed a timber culture claim, were included in the transaction of February 16, 1898. The property involved is the defendant's interest in the "Horseman Bros. Estate," whatever that may be. In 1890, during the early existence of the co-partnership, the defendant purchased, with partnership assets, of one J. L. Hall his pre-emption claim, taking a deed therefor in his own name, also certain rights not clearly defined in the two quarter sections of land, which defendant afterward entered, one as a homestead, the other as a timber culture, paying for the whole money and property equivalent to \$1,500; the value of the right to the homestead and the timber culture being estimated at \$300. About the same time the defendant purchased other lands with the partnership funds, taking the title in his individual name. All these lands have

since been used and employed in connection with the partnership business, and treated, managed, and controlled as partnership assets, including both the homestead and the timber culture tracts. The main improvements are upon the homestead, which constituted the realty of chief value to the business of the firm. J. A. Horseman, G. L. Horseman, and Frank Spike, who were in part instrumental in bringing about the agreement, all testify that it was understood and especially mentioned that the homestead and timber culture were included in the agreement to sell; and, while defendant denies that such was the case, he made admissions, immediately after the agreement was entered into, to Ben and Tom Ogle, that he had sold all his interest in the Horseman Bros. Estate, and that he was to deed some of the land as soon as he proved up on it. He executed a deed to all the lands standing in his name, and it is further shown that he surrendered possession of all except the homestead, and possibly the timber culture, at once; but as to these he surrendered possession to the purchasers after he had made final proof upon the homestead, which occurred April 8, 1898. From this testimony, and the conduct of the defendant relative to the homestead and timber culture claims, we are impelled irresistibly to the conclusion that both were included in the agreement to sell and convey, and were considered as constituting a part of the Horseman Bros. Estate, and that it was so understood by all the parties to the contract of sale. These are, in substance, all the facts necessary to be noticed in the determination of this case.

Counsel for plaintiffs makes two contentions: (1) That plaintiffs are entitled to have the notes delivered up to them, and the mortgages executed to secure their payment canceled; and (2) that they are entitled to a deed from the defendant to his homestead. Defendant's counsel controvert both these contentions, and insist that the

alleged agreement on the part of the defendant to sell and convey his homestead to the plaintiffs is against public policy, having been entered into prior to the issuance of the patent therefor, and therefore that equity will not interfere to enforce it.

1. We will inquire first as to the validity of the agreement. Prior to March 3, 1891, any person applying to enter land as a homestead was required to make and file an affidavit deposing that his application was made for his exclusive use and benefit, for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person: Rev. Stat. U. S. § 2290. The amendment of March 3, 1891 (chapter 561, § 5, 26 Stat. 1097), makes some changes, but the section remains substantially the same as to the provisions noted: See U. S. Comp. Stat. 1901, p. 1389, § 2290. By the section next succeeding it is provided that no certificate or patent shall issue, except upon affidavit of the entryman, his widow, heirs, or devisees, that no part of such land has been alienated, except, as provided in a previous section, for church, cemetery, or school purposes, etc. This statute has received explicit consideration by the federal supreme court, which tribunal has declared it to be the purpose of the general government by the enactment to secure homesteads to actual settlers, whose intent and purpose it is to occupy and cultivate the lands; that it is the manifest policy of the government to interdict alienation by the settler until he has performed upon his part all that is required of him for the acquirement of the title, and that the exaction of the affidavit of nonalienation is a clear expression of the legislative intent in that relation; that a contract to convey, made during the transition period, having for its purpose the execution of a regular conveyance of the title when acquired, is an alienation, within the spirit and purpose of the statute, and is therefore illegal

and void; that the consummation of such a contract would necessarily rest in perjury, presumably within the contemplation of both vendor and purchaser; and that courts will refuse to enforce such a relation, not from any regard to the vendor, but from suggestions and motives of public policy: *Anderson v. Carkins*, 135 U. S. 483 (10 Sup. Ct. 905).

And the undoubted preponderance of the adjudications of the state courts is to the same purpose. Mr. Justice BREWER, while a member of the Supreme Court of Kansas, said "that, whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it": *Mellison v. Allen*, 30 Kan. 382, 385 (2 Pac. 97, 99). Again, in *Dawson v. Merrille*, 2 Neb. 119, 124, it is said: "These provisions, if they do not directly prohibit the making of this contract, do yet most clearly indicate a policy adverse to such contracts. The cases are numerous in which it has been held that such contracts are void. * * The court will not lend its aid to the enforcement of such contracts by decreeing their specific performance or otherwise." So, in *Oaks v. Heaton*, 44 Iowa, 116, 120, the court say: "If plaintiff had agreed with defendant that plaintiff would abandon his preëmption claim in consideration that defendant would convey to plaintiff one half the land, and then go before the register or receiver of the land office and falsely make affidavit that no part of the land had been alienated, and thus, by perpetrating a fraud upon the government and committing a felony, obtain a patent for the land, no one, probably, would claim that any court could lend its aid to the enforcement of the agreement. Although not in words so expressed, yet such is precisely the effect of the agreement which the plaintiff seeks to enforce." And this court has said, having the statute in view: "If Thorn could not lawfully have made, in express

terms, a contract of this kind, none will be implied, and equity will not decree any relief in such a case": *Clark v. Bayley*, 5 Or. 343, 352. See, also, *Robinson v. Jones*, 31 Neb. 20 (47 N. W. 480).

2. A court of equity will therefore not help parties, finding them in the position of contracting, whereby they have in contemplation, by necessary implication or otherwise, an infraction of the law for the consummation of their mutual purposes, but will leave them where it finds them. It will not assist the party that may be benefited by such a fraud upon the government, and it cannot, for the same reason, aid the party that might be injured by the non-execution of the undertaking. The contract of the parties to this cause falls clearly within the interdiction of the statute. There was an undertaking by defendant to convey his homestead to plaintiffs after he acquired the title from the government or had proved up, and, although he remained in possession until he made final proof, that circumstance does not validate the contract. He had alienated the land, contrary to the spirit and policy of the law, when he sold and agreed to convey, and hence could not afterward make his final proof without an infraction thereof, and the plaintiffs necessarily contemplated acquirement of title through such illegal course.

"Where," say the learned authors of the American & English Encyclopedia of Law (2 ed.), vol. 15, p. 988, "a contract which is entire contains a stipulation or agreement which, is illegal, and which, therefore, is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced. The illegal stipulation or agreement in such a case penetrates and corrupts the whole contract, and vitiates it as an entirety." But it is argued that the contract here involved is severable, so that the court may enforce the good, and leave the parties without relief

as to the bad. We cannot concur in that view. Quoting again: "A contract may be said to be entire when, by its terms, nature, and purposes, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties to be so": 15 Am. & Eng. Ency. Law (2 ed.), p 988. By the present contract the property was sold in a mass, for the lump consideration of \$4,250, without specific designation or agreement as to the value of particular items thereof, each and all of its parts being common to each other and interdependent, so that it is clearly an entire contract, within the definition above given. For a case of marked analogy see *Wehrung v. Denham*, 42 Or. 386 (71 Pac. 133).

3. This conclusion renders it unnecessary to consider whether plaintiffs are entitled to have the notes delivered and the mortgages canceled, for the court will leave the parties where it found them, without rendering aid or relief to either. It will not enforce a specific performance relative to the conveyance of the homestead, neither will it require a surrender or cancellation of the unpaid note and mortgages, or interfere to relieve against the condition in which the parties have voluntarily placed themselves. As found by the trial court there was in the hands of the clerk \$2,271.25 in money which the plaintiffs realized from the cattle covered by the alleged chattel mortgage, which had been paid into the First National Bank of Pendleton by plaintiffs, and transferred by order of the court to the clerk. This money was not paid in execution of the contract, but was deposited in the bank with the understanding that, until the parties should settle the dispute other-

wise—that is, as to the amount of money necessary to discharge the notes—it should be used to take up the notes as they became due. One of them was taken up before the money came into the custody of the court, but the other never has been, and the dispute resulting in this litigation has never been settled. It was error, therefore, to direct the clerk to indorse this sum on the note, and to deliver the same to the defendant, as such disposition of the fund was an enforcement in part of the contract. The money should have been returned to plaintiffs, and the note to the bank, its custodian for defendant.

4. Assuming that the decree has been carried into effect, and the money paid over by the clerk to defendant as directed, the decree of this court will be that plaintiffs have and recover of and from the defendant the sum of \$2,271.25, with legal interest from the date of such decree, together with their costs and disbursements on this appeal, and that otherwise the cause be dismissed without prejudice to the parties.

MODIFIED.

Argued 29 December, 1902; decided 26 January, 1903.

STATE v. BELDING.

[71 Pac. 330.]

43 96
c46 261
f46 266

CRIMINAL LAW—INFORMATION—NEED OF PRELIMINARY EXAMINATION.

1. Section 1600 of B. & C. Comp., providing that "The defendant must in all cases be taken before the magistrate without delay," is not mandatory, but should be considered in connection with sections 1258 and 1260, providing for the filing of informations by district attorneys on or before the first day of the next regular term of the circuit court before which he is required to appear in cases where the defendant has been held to answer, and when so read it is directory only, for section 1260 permits the district attorney to charge a person with the commission of a crime without a preliminary examination before a magistrate.

INDORSEMENT OF INFORMATION BY DISTRICT ATTORNEY.

2. The district attorney alone is responsible for the filing of an information, and the fact that it is filed sufficiently indicates his conclusion as to whether an offense has been committed, without any indorsement such as is required where an indictment is returned by a grand jury.

IDEM.

3. An information filed by a district attorney indorsed "A true information," followed by the printed words "Geo. E. Chamberlain, District Attorney," is sufficiently indorsed, for by filing it the printed signature was adopted by the district attorney as his own.

INDORSING NAMES OF WITNESSES ON INFORMATION.

4. The provision of Section 1262, B. & C. Comp., that the names of all witnesses examined on oath or affirmation by the district attorney in support of an information must be added thereto before it is filed, or the testimony of such witnesses cannot be heard, is not a requirement that the accused shall be furnished with the names of intended witnesses who were examined after the filing of the information, nor a prohibition against calling other witnesses than those whose names were added to the information.

From Multnomah: MELVIN C. GEORGE, Judge.

A. L. Belding appeals from a judgment of death on a conviction of murder.

AFFIRMED.

For appellant there was a brief over the name of *Murphy, Swett & Watts*, with an oral argument by *Mr. Daniel R. Murphy*.

For the state there was a brief and an oral argument by *Mr. Geo. E. Chamberlain*, District Attorney.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, A. L. Belding, was informed against, tried, and convicted of the crime of murder in the first degree, alleged to have been committed in Multnomah County, Oregon, July 11, 1902, by killing one Deborah A. McCroskey, and from the judgment which followed he appeals.

1. The bill of exceptions shows that he was arrested a few minutes after the homicide, charged therewith, and lodged in jail without bail, and without any commitment by a magistrate. The information was filed July 15, 1902, and upon being arraigned he moved to set it aside on the ground that he had been deprived of the benefit of a preliminary examination, which motion being overruled, his counsel contend that an error was thereby committed. It is argued that the following clause, prescribing the procedure in criminal cases, is mandatory, to wit, "The defendant must, in all cases, be taken before the magistrate without delay": B. & C. Comp. § 1600. It is maintained by the district attorney, however, that the following pro-

vision, passed at the same session of the legislative assembly as that quoted, must be read in connection with it, and that, when construed together, the former becomes directory only, viz.: "The grand jury may indict or present a person for a crime, when they believe him guilty thereof, whether such person has been held to answer for such crime or not": B. & C. Comp. § 1278. It is possible so to construe these sections as to permit each to remain intact, on the assumption that both were adopted as a part of the same general plan of criminal procedure; for it will be observed that, though a person charged with the commission of a crime might, upon his preliminary examination, be discharged by a magistrate, such exoneration would not preclude the grand jury from indicting him. If it be conceded that the position assumed by defendant's counsel is correct, that Section 1600, B. & C. Comp., requiring all persons arrested for the commission of a crime to be taken before a magistrate without delay, is mandatory, the act of February 17, 1899, providing for criminal prosecutions on information (B. & C. Comp. §§ 1258-1264), permits a district attorney, in our opinion, legally to charge any person with the commission of a crime without his having been taken before a magistrate for a preliminary examination. The act in question provides, in effect, that it shall be lawful for, and is made the duty of, the district attorney to file an information in the county where a crime has been committed, charging any person therewith: B. & C. Comp. § 1258. The information shall be substantially in the form and according to the manner of stating the act constituting the crime as provided for in an indictment, except that the words "district attorney" shall be used, instead of the words "grand jury," wherever they occur: B. & C. Comp. § 1259. From the time the information is filed it shall be construed like, and deemed in

all respects as, an indictment, and subject to the same proceedings, including judgment and execution, as if it had been returned by a grand jury: "Provided, that when a defendant has been held to answer, as provided in Chapter XXII of Title XVIII of said Criminal Code, the information against him shall be filed on or before the first day of the next regular term of the circuit court, before which he is required to appear, unless such circuit court, upon good cause stated by the district attorney, shall extend the time": B. & C. Comp. § 1260. The requirement that the information shall be filed within the time prescribed when the defendant has been held to answer clearly implies that a person may be charged by the district attorney with the commission of a crime without having had a preliminary examination of the case before a magistrate.

It must be admitted that the act of 1899, under consideration, vests the district attorney with vast power, which, if oppressively exercised, might possibly abridge the constitutional right of one accused of a crime to demand the nature and cause of the accusation against him: Const. Or. Art. I, § 11. When a defendant in a criminal action is examined before a magistrate, the state is expected to produce sufficient testimony to prove that a crime has been committed, and also to make a *prima facie* showing that the person accused thereof is apparently guilty: B. & C. Comp. § 1643. By this means the defendant, without offering any testimony in exculpation, is generally enabled to ascertain the nature of the indictment likely to be returned against him, and also to anticipate the extent and character of the testimony that will probably be produced in support of the charge, thus enabling him intelligently to prepare for his defense. The practice, however, of indicting persons without according them preliminary examinations (B. & C. Comp. § 1278), has long been acquiesced in by the courts of this state, but in such cases the per-

sons accused, relying upon the presumption that official duty has been regularly performed (B. & C. Comp. § 788, subd. 15), might safely conclude that five of the grand jurors, at least, concurred in believing that all the evidence before them, taken together, was such as, in their judgment, would, if unexplained or uncontradicted, warrant a conviction by a trial jury: B. & C. Comp. §§ 1284, 1294. It is possible that the district attorney, under the act of 1899, might call in support of a criminal charge but few witnesses, whose names would be inserted at the foot of or indorsed upon an information, and the person accused have no knowledge of the proceeding until taken before a court for arraignment; and, though he would then be informed of the nature of the accusation against him, and supplied with a copy thereof, he might be surprised at the trial by the testimony of many other witnesses against him whose names were not so inserted or indorsed. So, too, he might be arrested, and, without a preliminary examination, lodged in jail, charged by the district attorney with a nonbailable crime (Const. Or. Art. I, § 14), to abide the result of his trial in the circuit court upon an information, thus depriving him in the mean time of any opportunity to establish his innocence; and, though the letter of the law may have been strictly kept by the procedure adopted, the spirit of fairness that has ever characterized American jurisprudence, as applied to criminal prosecutions, would thereby be grossly violated. We do not wish to be understood as intimating that in the case at bar the district attorney has exercised any authority to the oppression of the defendant. The guaranty of the organic law of the state that the accused in a criminal prosecution shall have the right to meet the witnesses face to face (Const. Or. Art. I, § 11) is satisfied when at some stage of the trial the defendant is confronted with the witnesses, and given an opportunity to cross-examine

them: *Goldsby v. United States*, 160 U. S. 70 (16 Sup. Ct. 216); *In re Bates*, Fed. Cas. No. 1,099a. The right of the legislative assembly to prescribe the mode of procedure in the trial of criminal actions, when not violative of the organic act of the state, is conceded, but as the practice under the act of 1899 has evoked much criticism from the members of the bar, upon the theory that the district attorney has been clothed with too much power, an amendment of that act, so as to make it conform to, and bring it in harmony with, the spirit of the age, would undoubtedly conduce to the general welfare of the state, and safeguard the interests of those persons who may be accused of the commission of crimes upon information. The statute having authorized the district attorney to file an information without an examination of the charge by a committing magistrate, no error was committed in refusing to set aside the information because it was so filed.

2. It is insisted by defendant's counsel that the court also erred in overruling their motion to set aside the information on the ground that it was not properly indorsed. The statute regulating procedure of this character provides that an information shall be substantially in the form prescribed for an indictment (B. & C. Comp. § 1259), which form requires that the latter pleading shall be indorsed "A true bill," and signed by the foreman of the grand jury: B. & C. Comp. § 1304. The purpose to be subserved by requiring an indictment to be indorsed in the manner indicated was evidently to certify to the court the conclusion reached by at least five of the grand jurors, who must concur therein before it is returned (B. & C. Comp. § 1294); but such indorsement is not a jurisdictional prerequisite, nor is it an essential statement of any fact constituting the commission of the crime: *State v. McElvain*, 35 Or. 365 (58 Pac. 525). The district attorney is alone responsible for informations returned into court,

the filing of which affords conclusive evidence of his intention to prosecute the persons charged ; and, as the law does not require the performance of vain things, no necessity would appear to exist for indorsing the information in the manner insisted upon.

3. Besides, the pleading is indorsed "A true information," under which appear the printed words "Geo. E. Chamberlain, District Attorney." This was an adoption by that officer of the printed signature as his own, binding him as effectually as if personally subscribed by him, and rendering the indorsement a substantial compliance with the provisions of the statute.

4. The information contains the names of nine witnesses who had been examined in support of the charge, and on the day of the trial the district attorney, at defendant's request, furnished him a list of the names of such other witnesses as he expected to call on behalf of the state ; but he was permitted, over defendant's objection and exception, to introduce the testimony of five other witnesses, whose names did not appear on the information or in the list so supplied, and it is contended that an error was thereby committed. The statute requires that the name of each witness examined on oath or affirmation by the district attorney in support of any information shall be inserted at the foot of or indorsed thereon before it is filed ; otherwise the testimony of such witnesses cannot be heard against the defendant at the trial of such information : B. & C. Comp. § 1262. No complaint is made that the district attorney did not indorse upon the information the names of all the witnesses examined by him upon oath or affirmation in support of the charge. The statute does not require that a person accused of a crime shall be furnished with the names of witnesses who were not examined by the district attorney prior to filing the information before they can testify against him in a criminal action, but,

such course having been adopted in the present instance, dispels every inference of a purpose to mislead the defendant. There being no evidence of any practice tending to restrict the rights of the defendant to a fair trial, or to take an advantage of him, no error was committed in permitting witnesses whose names are not noted on the information to testify for the state at the trial: *State v. Warren*, 41 Or. 348 (69 Pac. 679); *Keener v. State*, 18 Ga. 194 (63 Am. Dec. 269); *State v. Abrahams*, 6 Iowa, 117 (71 Am. Dec. 399).

No error appearing from the bill of exceptions, it follows that the judgment is affirmed. AFFIRMED.

Decided 2 June, 1908.

WALKER v. FIRST NATIONAL BANK.

[72 Pac. 635.]

NECESSARY ELEMENTS OF CONVERSION.

1. To constitute a conversion it must appear that the person charged has exercised some act of dominion or control over the property of another inconsistent with the latter's rights, or has aided or assisted some one else to do so.

ACCEPTING PROCEEDS OF ANOTHER'S PROPERTY NOT A CONVERSION.

2. The acceptance by a creditor of money in payment of a debt, not knowing that it did not belong to the debtor, is not a conversion by such creditor of the money, though it might be otherwise if he had received possession of property that the debtor did not own.

PASSING TITLE BY DELIVERING BILL OF LADING—PAROL EVIDENCE.

3. Although a bill of lading represents the property for which it was given, and title to such property, when so intended by the parties, may pass by indorsement or delivery of the bill, neither indorsement nor delivery has any such effect in passing title, except as the result of contract between the parties, and the real transaction may be shown by parol.

EXAMPLE OF CONDUCT NOT CONSTITUTING A CONVERSION.

4. A bank cannot be held liable for conversion by a flouring mill company in manufacturing flour from wheat belonging to plaintiff, and selling the same, by receiving in good faith, and without knowledge of plaintiff's rights, a draft drawn on the purchaser for collection, together with a bill of lading for the flour, and after making collection, disbursing the proceeds.

From Umatilla: W. R. ELLIS, Judge.

This is an action by J. M. Walker against the First National Bank of Athena and Hugh McLean for the alleged conversion by the defendants of 1,020 sacks of flour manu-

factured from wheat belonging to the plaintiff. The facts are that some time prior to January, 1902, the Athena Flouring Mill Company owned and operated a flouring mill at Athena, and was engaged in the business of purchasing wheat and manufacturing it into flour for sale. It also received grain on storage, for which it issued warehouse receipts. During the month of December, 1901, it wrongfully and without authority converted into flour wheat which plaintiff had in store with it, and loaded it, with other flour belonging to the company, aboard a car, for shipment and sale. While the car containing such flour was standing on the mill track or spur, defendant McLean demanded of the company pay for wheat it had previously purchased, and threatened, in case payment was not made, to attach the car load of flour. The manager of the company told him that it was needless for him to do so, and that he should be paid out of the proceeds of the flour as soon as received. McLean, assenting to this arrangement, took no further steps for the collection of his debt; and the mill company thereafter shipped the flour in its own name to Newhall & Co., San Francisco, drew its draft on the consignee for the value thereof, and deposited the same, with the bill of lading attached, in the defendant bank for collection, with instructions to retain from the proceeds the sum of \$87.50 for money the bank advanced for freight on the shipment, and from the remainder to pay the amount due McLean. The draft and bill of lading were forwarded to San Francisco, where the draft was collected; and the bank, after deducting the money advanced by it, paid the debt due McLean from the mill company, and disbursed the balance upon checks drawn against it by the company. Both the bank and McLean acted in good faith. Neither had any notice or knowledge that the plaintiff had any interest in the flour, or that it was manufactured from his wheat, but both sup-

posed it was the property of the mill company, and did not learn of the plaintiff's claim thereto until long after the money had been collected and disbursed as above stated. The court below held that upon these facts the defendants were not liable for a conversion of the flour, and entered judgment accordingly, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *R. J. Slater* and *Jas. A. Fee*, with an oral argument by *Mr. Slater*.

For respondents there was a brief over the names of *Carter & Raley* and *Balleray & McCourt*, with an oral argument by *Mr. Chas. H. Carter* and *Mr. John J. Balleray*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. A conversion is defined by this court, in *Ramsby v. Beezley*, 11 Or. 49 (8 Pac. 288), as "any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it"; and in *Perkins v. McCullough*, 36 Or. 146 (59 Pac. 182), it is held that "all persons who aid, advise, or assist the commission of a tort are as fully liable as if they had personally committed the objectionable act." Before the defendants, or either of them, can be held liable for a conversion of the plaintiff's property, therefore, it must appear from the testimony that they have exercised some act of dominion or control over it inconsistent with his rights, or have aided or assisted some other person to do so.

2. Now, it does not appear that either McLean or the bank had or exercised any dominion or control over the flour, nor was the conversion by the mill company with or by their advice or approval. McLean's only part in the transaction was to receive and accept in good faith a part of the proceeds of the flour in payment of a debt due him from the company, without any knowledge or notice that

the flour belonged to the plaintiff, or that he had any interest in or claim thereto. The receipt by a creditor of money in payment of a debt, without knowledge or means of knowledge, that it did not belong to the debtor, does not make him liable therefor to the true owner: *Newhall v. Wyatt*, 139 N. Y. 452 (34 N. E. 1045, 36 Am. St. Rep. 712). When personal property has been converted by a wrongdoer, it may be followed by the owner into the hands of any one receiving it, whether taken with knowledge of his right, or not, so long as the identity of the property can be shown, whatever form it may take: *Velsian v. Lewis*, 15 Or. 539 (16 Pac. 631, 3 Am. St. Rep. 184); *Williams v. Merle*, 11 Wend. 81 (25 Am. Dec. 604); *Merchants' & P. Bank v. Meyer*, 56 Ark. 499 (20 S. W. 406); *Kimball v. Billings*, 55 Me. 147 (92 Am. Dec. 581); *Swim v. Wilson*, 90 Cal. 126 (27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110). But when the property has been converted into money, and the money has lost its specific identity by becoming a part of a large mass, the original owner of the property cannot assert his right against the one receiving the money in good faith: *Le Breton v. Pierce*, 2 Allen, 8.

It is settled by repeated decisions that money, even when obtained by fraud or felony, cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in the due course of business. "It is absolutely necessary for practical business transactions," say the Supreme Court of New York in *Stephens v. Board of Education*, 79 N. Y. 183, 187 (35 Am. Rep. 511), "that the payee of money in due course of business shall not be put upon inquiry, at his peril, as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived

it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder, as to third persons dealing with him, and receiving it in due course of business and in good faith upon a valid consideration." And Lord MANSFIELD, in *Miller v. Race*, 4 Burr, 432, says that money "never shall be followed into the hands of a person who *bona fide* took it in the course of currency, and in the way of his business." We think it clear, therefore, that McLean cannot be held liable for a conversion of property belonging to plaintiff, by simply receiving in good faith, in payment of a debt due him, a part of the money for which it was sold, although he knew the source from which the money was derived. By so doing he was not guilty of a conversion of the property. He did not exercise any control or dominion over it inconsistent with the plaintiff's rights.

3. It is argued, however, that the bank is liable in any event, because the bill of lading was delivered to it by the mill company, transmitted by it to San Francisco, and there delivered to the consignee. A bill of lading represents and stands for the property for which it was given, and the right and title of such property may pass by an indorsement of the bill, or by a mere delivery thereof, when such was the intention with which the indorsement or delivery was made: 4 Am. & Eng. Ency. Law (2 ed.), 547. But neither the indorsement nor delivery of a bill of lading has any effect in passing the title or dominion or control over the property, except as the result of a con-

tract between the parties, and the real transaction may be shown by parol.

Now, the evidence in this case shows that the bill of lading was not transferred or delivered to the bank with any intention that either the title or control of the property should pass to it. The bank was simply used as a convenient means by which the mill company could transmit the bill of lading to its consignee, and receive the money for the flour before the delivery of the bill. It acted as a mere agent for the collection of the money due from the consignee, and not for the sale or disposition of the flour. It did not own the bill, had no connection whatever with the contract of sale by the mill company to the consignee, took no part therein, and was in no way identified therewith. If the draft accompanying the bill had not been paid on presentation, the bank would have had no authority, without further directions from the mill company, to sell or dispose of the flour, or to exercise any dominion or control over it. In *Dodge v. Meyer*, 61 Cal. 403, relied upon by the plaintiff, the defendant purchased from the consignor of grain shipped to Europe a draft drawn on the consignee, and received as security therefor an assignment or transfer of the bill of lading, knowing at the time that the goods did not belong to the consignor, but to the plaintiffs. The majority of the court held that under the circumstances the transaction operated and was intended as a pledge of the goods to the defendant as security for the draft, and, as a holder of the bill, he was guilty of conversion in refusing to deliver it to the plaintiffs on demand. There is a strong intimation in the opinion, however, that he would not have been liable if he had been a mere collecting agent for the consignor. The case, on its facts, differs materially from the one now under consideration. Here the bank did not purchase the draft, and had no interest therein, except as a mere collecting agent. It knew

nothing of the plaintiff's ownership of the property, but supposed that it belonged to the mill company. The bill of lading was not delivered to it with any intention of passing title, or as security for the payment of the draft. The position of the plaintiff is, in effect, that every bank which in due course of business and in good faith receives for collection a draft drawn by a consignor of goods upon his consignee, if accompanied by the bill of lading, becomes *ipso facto* a pledgee of the goods, and is guilty of a conversion if they do not in fact belong to the consignor, although it never received possession of them, nor exercised any dominion or control over them. We do not find any support in the authorities for such a doctrine, and are unwilling to announce it as a principle of commercial law. It has, indeed, been held that where a bank discounted a draft of the consignor, and was itself named as the consignee in the bill of lading, its indorsement and delivery of the bill to the drawee of the draft and party for whom the goods were intended, upon receiving the pay therefor, did not make it liable for a conversion, because there was not such an appropriation or assumption of such dominion or control over the property, to the exclusion of the real owner, as amounted to a conversion. It was shown, notwithstanding the form of transaction, that the bank was in fact acting as a mere financial agent for the consignor for the transmission of the bill of lading and the collection of the money: *Leuthold v. Fairchild*, 35 Minn. 99 (27 N. W. 503, 28 N. W. 218).

It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 18 March, decided 30 March, 1903.

STATE v. SMITH.

[71 Pac. 973.]

43	100
43	158
43	161
43	109
45	573

CRIMINAL LAW—RES GESTÆ.

1. A declaration by a person charged with a crime, made after his arrest and when sufficient time had elapsed to formulate a plan of defense, is not part of the *res gestæ*, since it is not so intimately connected with the principal event, either in time or character, as to explain or illustrate it.

RULE AS TO ERROR IN REFUSING INSTRUCTIONS.

2. A court may properly refuse requested instructions to a jury where they are not correct expositions of the law as applied to the theory adopted by the party presenting them, and the court does not thereby refuse to present the theory of the party desiring the instructions.

HOMICIDE—SELF-DEFENSE—IMMINENT DANGER—THREATS.

3. The right of self-defense justifying a homicide rests on the necessity of protection from a reasonably apprehended imminent danger, and must be based on some overt act of hostility, mere threats not being sufficient.

SELF-DEFENSE—DANGER MUST BE IMMINENT.

4. An apprehended bodily danger that will justify a resort to force, and an assertion of the right of self-defense, must be imminent, or apparently likely to at once be experienced.

IDEM.

5. To find a person guiltless of homicide in any degree on the ground of self-defense, the jury must find, not only that accused acted under fear of imminent death or great bodily harm, but that there was actually reasonable ground for such fear on his part.

IDEM.

6. A homicide cannot be justified on the ground of self-defense unless it is made to appear that accused had been put in imminent danger by another, and that the killing was done to prevent the apparent commission of a felony by that other on accused.

IMPEACHING VERDICT BY AFFIDAVIT OF JUROR.

7. Affidavits or statements of jurors will not be received to impeach their verdict.

From Multnomah: MELVIN C. GEORGE, Judge.

George Smith appeals from a sentence of death for murder.

AFFIRMED.

For appellant there was a brief over the names of *Chas. A. Petrain* and *Wilson T. Hume*, with an oral argument by *Mr. Hume*.

For the state there was a brief over the names of *John Manning*, District Attorney, *Arthur C. Spencer*, and *Harry B. Adams*, with an oral argument by *Mr. Manning*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, George Smith, having been convicted of the crime of murder in the first degree, alleged to have been committed in Multnomah County, Oregon, August 22, 1902, by killing one Annie Smith, appeals from the judgment which followed.

1. At the trial, Frank Snow, a detective, having testified that about 12 o'clock m. of the day of the homicide the defendant was brought as a prisoner to the police station in Portland, and that he received some keys from him, was asked by defendant's counsel, "What did he say with reference to those keys when he gave them to you?" An objection to the question on the ground that it was incompetent having been sustained, it is contended that the court erred in not permitting it to be answered. The bill of exceptions shows that the defendant is a colored man, and that the deceased, a white woman, was his wife, and at the time of her death an inmate of a house of ill-fame. A witness for the state testified that a few hours before the homicide he saw the defendant exhibit a revolver to another colored man, saying, "I will get some white person before long." But the defendant, as a witness in his own behalf, denied that he made the threat so imputed to him, and sought to show, by the question propounded to Snow, that he went to his wife's room for a lawful purpose at the time she was killed. To render declarations made by a party after the commission of an act which is the subject of inquiry admissible in evidence as a part of the *res gestæ*, they must have grown out of and been so intimately connected and contemporaneous with such act as to illustrate its character, affording a mirror which involuntarily reflects the cause, motive, or effect of the particular action: *State v. Glass*, 5 Or. 73; *State v. Anderson*, 10 Or. 448; *State v. Ching Ling*, 16 Or. 419 (18 Pac. 844); *State v. Henderson*, 24 Or. 100 (32 Pac. 1030); *State v. Brown*, 28 Or. 147 (41 Pac. 1042); *State v. Sargent*, 32 Or. 110 (49 Pac. 889). The

bill of exceptions does not show what time elapsed between the homicide and the defendant's incarceration, but, as it must have been ample for him to formulate a plan of defense justifying his conduct or mitigating the consequences of his act, the declaration sought to be established was self-serving, and no error was committed in excluding it.

2. It is maintained that the court erred in refusing to give the jury certain instructions requested by defendant's counsel. Testimony was introduced by defendant tending to prove that one Ed Potello, alias "Kansas," was keeping the defendant's wife as his mistress; that, a controversy having ensued in consequence of such conduct, Potello assaulted the defendant with a pistol, inflicting a wound upon his head; that Potello had informed others that he intended to kill the defendant, and, such threats having been communicated to the latter prior to the homicide, he sought protection from the chief of police and other officers; that defendant, having secured his wife's trunk, containing some of her clothing, locked it in his room, refusing to deliver it upon demand, and that on the day before the homicide he secured a ticket, intending to go to Astoria. The defendant, as a witness in his own behalf, testified as follows: "On the day of the shooting I went down to my wife's room with the keys to the room where her trunk was, to give her the keys, so she could get the things. I went to her room, and she told me to go away, as there was somebody in there. I asked her to have a drink. Some man's voice said to me, 'Bring up two bottles of wine, you black * *' I went down stairs, and brought up the drinks. My wife opened the door, and we talked about the keys, and my going away to Astoria. While I was talking to her, I saw a man who I thought was 'Kansas' crouching past by the bureau and get behind the door in a crouching position and come towards me. I thought the man was 'Kansas,' and that he was going to try to

kill me. I fired the shot intending to protect myself from 'Kansas,' and as I fired, my wife drew back suddenly towards where the man was inside, and the bullet struck her."

The instructions which the court refused to give, so far as deemed applicable to the question involved, are as follows:

"There has been some evidence introduced in behalf of the defense in this case, which, it is claimed by the defendant, tends to prove that one Ed. Potello, otherwise known in the testimony as 'Kansas,' had made threats to inflict bodily harm upon the defendant, and that, in pursuance of such threats, there had been at different times altercations between the defendant and the said 'Kansas,' and that at the time of the shooting testified to in this case the defendant believed that this man 'Kansas' was in the room where the deceased was; and it is claimed by the defendant that, seeing a man in the room with the deceased, he believed that the man was 'Kansas,' and feared that the said 'Kansas' would carry out his threats to inflict great bodily harm upon or to take the life of the defendant, and that, believing this, he acted upon the impulse to protect himself and to prevent the said 'Kansas' from inflicting the said harm, and fired the fatal shot with the intention of preventing the said 'Kansas' from assaulting him, and without the intention of shooting the deceased.

"(1) I therefore charge you that if you believe, from the evidence in this case, that Ed. Potello, or, as he is known in the testimony, 'Kansas,' had made threats against the defendant to inflict death or great bodily harm upon him, that the defendant would have had a right to use such reasonable means to protect himself as, under the circumstances, an ordinarily reasonable man would have used, if the person in the room with the deceased had been 'Kansas'—that is, if you believe that the threats testified to were made, and the defendant had reasonable ground to believe that the said threats would be carried out by 'Kansas,' under all the circumstances of the case, an ordinary reasonable man would have had a right to believe that the

person in the room with the deceased was 'Kansas,' and there were such circumstances and surroundings that would lead an ordinary man to believe that he was in danger of being assaulted or of receiving great bodily harm from the person so in the room with the deceased—then I charge you that the defendant had a right to act upon appearances as they looked to him at the time, or as they would have looked to an ordinary man under all the testimony in this case; and if the testimony should show that the defendant was mistaken in the fact that the man in the room with the deceased was 'Kansas,' he would only be responsible for the appearances as they looked to him at the time; and if you have a reasonable doubt from the evidence as to whether or not the defendant believed that the man in the room with the deceased was 'Kansas,' and that the defendant, in fear of the said 'Kansas,' on account of the threats and other circumstances as I have instructed you, fired the fatal shot, intending then and there to protect or defend himself against an anticipated assault, and that inadvertently and without his fault the deceased came in range of his pistol and received the bullet therefrom which caused her death, and if you have a reasonable doubt as to whether or not the defendant intended the said bullet to strike and wound the deceased, then I charge you that the defendant would not be guilty of murder in the first degree, and you must find him not guilty thereof.

"(2) And I further charge you that if you have a reasonable doubt as to whether or not the defendant, acting under fear of receiving death or great bodily harm from the man in the room on account of any circumstances, whether threats heretofore made by 'Kansas' and communicated to the defendant, or by reason of the crouching position or other suspicious movements of the man in the room, he fired the fatal shot upon the sudden impulse, acting under such fear and under such circumstances, and you have a reasonable doubt as to whether or not he intended to shoot or wound the deceased, you will find the defendant not guilty.

"(3) Where threats are made against a man's life, or threats to inflict great bodily harm or personal injury are made by a person whom the defendant, from the circum-

stances and dealings with such man, has reason to believe that such threats will be carried out, and has full knowledge of the character of such threats and the person making the same, he is not required to wait until he is assaulted or put in imminent danger of having such threats executed by the person making the same, but he has a right to act upon appearances, and, if it shall reasonably appear to him that the person making such threats is about to execute the same, he may use all reasonable means at his command, which appear necessary to him at the time, to defend himself, and prevent the execution or carrying out of such threats, and if he so does he is not guilty of any offense; and if, in so defending himself, he causes an injury or the death of a person other than the one making the threats, if, under all the circumstances of the case, he acted upon reasonable appearances, and drew such conclusions from the circumstances as they appeared to him that a reasonable man would draw, he will not be responsible for the injury or death resulting from his act, if he is mistaken in the person receiving the injury; and in this case, if you have a reasonable doubt as to whether or not the defendant believed the man in the room was Ed. Potello or 'Kansas,' and under the circumstances of the case he had a right, under the law, as I have instructed you, to defend himself, and was honestly mistaken in regard to the identity of the man in the room, he would not be criminally responsible for the result of the shooting. If you have a reasonable doubt as to whether or not he intended to shoot at the man in the room or at the deceased, you must acquit the defendant."

Exceptions having been taken to the court's refusal to give these instructions, it is argued that the defendant was entitled to have his theory of the case fully presented to the jury, and, that right having been denied him, error was thereby committed. The rule is well settled in this state that a party to an action, who has given testimony tending to sustain the issues on his part, is entitled to have the jury instructed on his theory of the case: *Fiore v. Ladd*, 25 Or. 423 (36 Pac. 572); *Barnhart v. Ehrhart*, 33 Or. 274 (54 Pac.

195); *Farmers' Bank v. Woodell*, 38 Or. 294 (61 Pac. 837, 65 Pac. 520); *Lewis v. Craft*, 39 Or. 305 (64 Pac. 809). In *Anderson v. North Pac. Lum. Co.* 21 Or. 281 (28 Pac. 5), Mr. Justice LORD, commenting upon this principle, says: "Without doubt it is the duty of the court to instruct the jury upon every point relevant to the issue, and either party has the right to have the jury so instructed plainly and pointedly, so as to avoid liability to mistake or error. Nor can it be denied that, if the court should fail so to instruct, it would be error to refuse instructions calculated to cure the omission." But before error can be successfully predicated upon the court's refusal to give the instructions requested, it must appear that they were correct expositions of the law applicable to the theory adopted by the defendant: *Blashfield, Instr. to Juries*, § 137.

3. The first instruction asked for stated that if the jury believed that Potello had made threats against the defendant to inflict death or great bodily harm upon him, he would have had a right to use such reasonable means to protect himself as, under the circumstances, an ordinary reasonable man would have used, if the person in the room with the deceased had been "Kansas." The reasonable means to be used in case of such threats is not indicated, but, as death ensued from the use of a pistol, it would seem to be implied from the language stated that, if Potello had threatened to kill the defendant, or to inflict upon him great bodily injury, he was thereupon justified in using a deadly weapon which might result in taking the life of Potello, without any overt act of a hostile character or any demonstration upon the part of the latter that would induce the defendant, as a reasonably prudent man, to believe that he was in imminent danger. Such is not the law. The right of self-defense rests upon the broad foundation of necessity (*State v. Morey*, 25 Or. 241, 35 Pac. 655, 36 Pac. 573; *Stanley v. Commonwealth*, 86 Ky. 440, 6 S. W. 155, 9

Am. St. Rep. 305), which is evidenced by a real or an apparent exhibition of force, to repel which, and to allay a reasonable apprehension of imminent danger, superinduced by some overt act, force may also be used (*United States v. Outerbridge*, Fed. Cas. No. 15,978), but without such necessity the right to resort thereto does not exist.

4. It is further stated in said first instruction that, if "there were such circumstances and surroundings that would lead an ordinary man to believe that he was in danger of being assaulted or of receiving great bodily harm from the person so in the room of the deceased, then I charge you," etc. It will be observed that the word "danger" is not qualified by the word "imminent." In *United States v. Outerbridge*, Fed. Cas. No. 15,978, Mr. Justice FIELD, in defining such limiting word, says: "By 'imminent danger' is meant immediate danger—one that must be instantly met, one that cannot be guarded against by calling on the assistance of others or the protection of the law." If the defendant did not, as a reasonably prudent man, apprehend the existence of immediate danger from the apparently probable execution of said threats, the necessity adverted to did not exist, and therefore he was not justified in resorting to the use of force. These elements having been omitted, no error was committed in refusing to give the first instruction.

5. In the second, the charge requested reads in part: "And I further charge you that if you have a reasonable doubt as to whether or not the defendant, acting under fear of receiving death or great bodily harm from the man in the room, * * fired the fatal shot upon the sudden impulse, acting under such fear and under such circumstances, and you have a reasonable doubt as to whether or not he intended to shoot or wound the deceased, you will find the defendant not guilty." In *State v. Morey*, 25 Or. 241 (35 Pac. 655, 36 Pac. 573), it was held that the right

of self-defense does not depend wholly upon the belief which the person claiming it entertained, but whether or not there was ground for a reasonable belief on his part that he was in danger of death or great bodily harm; Mr. Justice BEAN saying: "A man, though in no apparent danger, might kill another through fear, alarm, or cowardice, under the belief, honestly entertained, that great bodily harm is about to be inflicted upon him; and certainly it could not be claimed that under such circumstances he would be justified in so doing, because the belief would be an unreasonable one, and not justified by the circumstances in which he was placed. * * The reasonableness of the defendant's belief was to be determined from his standpoint, but it was a question for the jury as to whether he had sufficient grounds upon which to base such belief." If the defendant's fear was not well founded, he would not be guiltless in taking the life of a person whom he might have suspected of being Potello; for if he, intending to kill Potello, shot at, and, missing him, killed his wife, he is as guilty as though he had killed Potello: *State v. Johnson*, 7 Or. 210. Unless his fears were such as a reasonably prudent man would have entertained under all the circumstances, he would have been guilty of manslaughter at least; and hence an instruction to the jury to find him not guilty would be erroneous, and no error was committed in refusing to give it.

6. The statement in the third refused instruction that defendant was not required to wait until put in imminent danger is clearly erroneous. The right of self-defense will not avail where the difficulty was induced by the party himself: *State v. Hawkins*, 18 Or. 476 (23 Pac. 475). Before one can excuse his conduct in taking the life of another, it must appear that it was done to prevent the apparent commission of a felony by the latter upon him: *State v. Olds*, 19 Or. 397 (24 Pac. 394). No one is justified in taking

the life of another, unless the danger of suffering great bodily harm, or of losing his own life is imminent: *Goodall v. State*, 1 Or. 334 (80 Am. Dec. 396); *State v. Tarter*, 26 Or. 38 (37 Pac. 53); *State v. Porter*, 32 Or. 135 (49 Pac. 964). The legal principle stated in the third instruction asked for being erroneous, no error was committed in refusing the request therefor.

7. It is insisted that the court erred in overruling the motion for a new trial, and that, notwithstanding the action of a court in such matters is an exercise of discretion repeatedly held not to be subject to review, the consequences resulting from its refusal in this case ought to render an examination of the error assigned necessary. Assuming, *in favorem vitæ*, that the point insisted upon is well taken, we will, in the present instance, examine the reasons advanced in support of the motion for a new trial: *State v. Magers*, 36 Or. 38 (58 Pac. 892). The affidavit of one of the jurors is to the effect that during the trial Chauncey Ball, another juror, became dangerously ill, necessitating a postponement of one day; that when Ball returned, and the trial was resumed, he was unable to occupy his chair, and was frequently attended by a physician; that when the jury retired to deliberate on their verdict the juror making the affidavit was induced to consent to the conclusion reached under the apprehension that if they were not discharged without delay the effect of the confinement upon Ball would be serious. The affidavits of two other jurors, however, while admitting Ball's indisposition, are to the effect that his condition in the jury room was no worse than at the trial; that he took a part with the other jurors in discussing the testimony and deliberating upon the verdict; and that they heard nothing said by any of the jurors leading them to believe that the verdict of murder in the first degree was agreed upon because of Ball's condition. In *Cline v. Broy*, 1 Or. 89, it was held that the

affidavit of jurors will not be received to impeach their verdict. Judge Thompson, in his work on Trials (vol. 2, § 2618), speaking upon this subject, says: "Upon grounds of public policy, courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict." The rule thus announced is supported by such a decided weight of judicial utterance that we deem further citation of authority in support thereof unnecessary.

No error having been committed by the trial court, it follows that the judgment is affirmed. **AFFIRMED.**

Decided 2 June, 1903.

MARTIN v. MARTIN.

[72 Pac. 639]

EVIDENCE OF TRANSFER IN TRUST.

1. The evidence satisfies the court that the transfer questioned in this suit was made to the defendant as a trustee for plaintiff.

PAROL EVIDENCE OF TRUST IN PERSONAL PROPERTY—VARYING WRITING.

2. Parol evidence is competent to show that a transfer of personal property by a bill of sale absolute in form was in trust for the assignor.

ACCOUNTING—INTEREST ON TRUST FUNDS.

3. A trustee is not chargeable with interest on trust funds in his hands unless he has been negligent or unfaithful to his duty.

From Union: **ROBERT EAKIN**, Judge.

This is a suit by Joseph Martin against his son John Martin to declare a trust in personal property and for an accounting. In September, 1896, the plaintiff transferred to his son, the defendant, seven certain promissory notes by indorsement and a bill of sale, of which the following is a copy, omitting signatures:

"Cove, Union County, Oregon,

September the 8, 1896.

This is to certify that I, Joseph Martin, have this day sold to John Martin all of the following notes and accounts, for which I, Joseph Martin, have received full payment of the said John Martin, for all of the following notes and accounts: One note of six hundred dollars, maker Harris

H. French & Adelaide R. French, dated Feb. 1, 1895; one five hundred and sixty, makers W. T. Martin and Rebecca Tolly, dated Feb. 17, 1894; one note fifty dollars, dated March 21, 1895, made by John Martin; one note of two hundred and fifty dollars, dated March 8, 1892, makers M. S. Warren and Warren Sisters; one note of one hundred and forty dollars, dated November 22, 1892, maker M. S. Warren; one note of four hundred dollars, dated June the 1, 1895, maker John Martin; one note of one hundred and fifty dollars, dated December the 17, 1889, makers Thomas F. Weaver, Joseph Huffman, W. W. Gordan, Joel Weaver."

The defendant has collected \$600 on the Martin and Tolly note, \$150 on the Weaver note, and converted to his own use the two notes made by himself. The French note was paid to the plaintiff, who claims to have turned the money over to the defendant; but this is denied. The note of M. S. Warren and Warren Sisters has not been collected, nor has that of M. S. Warren, and the makers are probably insolvent. At the time of the transfer the plaintiff was about eighty-five years of age, feeble, and practically incapacitated from attending to his business. He claims and alleges that the notes were assigned and transferred to his son, in trust to collect the same, use a sufficient amount of the proceeds thereof to pay for his (plaintiff's) support and maintenance, and to invest and account to him for the remainder. The defendant, on the other hand, contends and avers that the transaction was an absolute sale, for an adequate consideration, consisting of some \$500 previously paid on account of board for the plaintiff, and \$20 in cash paid at the time of the transfer. He also alleges that he has since paid out for the plaintiff and on his account for board, clothing, and other necessary expenses various sums, aggregating \$766.40. The trial court found that the transfer was made in trust for the plaintiff, charged defendant with the amount of the various notes, with

interest, except the balance of the Weaver note, the two notes given by the Warrens, and the amount paid plaintiff on the French note, allowed him credit for money expended for board and other expenses of the plaintiff since the transfer, amounting to \$747.10, and entered a decree against him for a balance of \$1,010.17, and he appeals.

MODIFIED.

For appellant there was a brief over the name of *Ramsey & Oliver*, with an oral argument by *Mr. William M. Ramsey*.

For respondent there was a brief and an oral argument by *Mr. Thos. H. Crawford*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. From an examination of the evidence we are satisfied that the findings of the trial court to the effect that the transfer of the promissory notes in question was not intended as an absolute sale, but was made in trust for the use and benefit of the plaintiff, must be sustained. The plaintiff testifies that he was planning to go East on a visit, and his son was to keep the notes for him until his return, and then give them back to him; that he did not go, but allowed the arrangement to continue, and afterward collected the Martin and Tolly note, and turned the money over to defendant, who agreed to invest it in county warrants, or put it in the bank to plaintiff's credit. Mr. Prillaman, who drew the bill of sale, testifies that plaintiff and defendant came to his office, and told him that plaintiff had some notes he desired to turn over to defendant, and wanted a list of them made out; that they told him how they wanted the bill of sale written, and he did as they requested; that plaintiff said he wanted to go back to Iowa, and defendant was to let him have the money for that purpose, and paid him \$20 at the time. Mrs. William Martin

says that in the spring of 1901 plaintiff owed her for board, and she asked defendant to pay the bill; that he said he had been paying plaintiff's bills for some time, but would not do so any more, and that there were \$100 left, which he was going to keep for the plaintiff's necessary needs. W. T. Martin had a conversation with the defendant about two years before this suit was commenced, in which the defendant made no claim that he had purchased the notes from his father, but said that they could be credited "according to law;" that there were \$100 back and unpaid on the Weaver note, and that the plaintiff could get that at any time he wished. The defendant testifies that he had a settlement with his father at the time of the transfer, but gives no details thereof, and, in referring to the transfer itself, says that it was made to him as a gift, and in consideration of his advancing the plaintiff money to take him to Iowa; that he gave his father money for that purpose (without stating the amount), and then persuaded him not to go. The evidence of the defendant itself does not tend to prove a sale of the property to him as alleged in the answer, and, to our minds, the entire testimony indicates very clearly that the transfer was not so intended, but that it was made in trust for the use and benefit of the plaintiff. He was old and feeble at the time, and practically unable to attend to his business affairs. He was contemplating a trip East, and had the utmost confidence in his son. It was very natural, under such circumstances, that he should transfer these notes to his son with the understanding that the son should use the proceeds thereof, or as much as might be necessary, for his (plaintiff's) support and maintenance. Defendant's subsequent conduct in furnishing money for that purpose is corroborative of this theory. It is also borne out by the circumstance that after the transfer the plaintiff collected the amount due on one of the notes, and, according to the de-

fendant's testimony, he appropriated it to his own use. The defendant, however, never made any demand or claim on him for it, thus recognizing his right to its possession.

2. On behalf of the defendant it is argued that the evidence of the property having been transferred in trust varies or contradicts the written bill of sale, and hence it was error to admit it. The rule is elementary that parol evidence is not admissible to vary the terms of a written instrument, but a trust in personal property may be created or declared by parol: *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296); 27 Am. & Eng. Ency. Law (1 ed.), 54; *Savings Institution v. Hathorn*, 88 Me. 122 (33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382, and note). Such evidence is also competent to show that the transfer of personal property by a conveyance absolute in form was in trust for the assignor: *Chace v. Chapin*, 130 Mass. 128. A trust in real property can be created and preserved only by a writing, but in the case of personal property it may be done by parol. In either instance, however, the proof of a trust does not vary or contradict the writing conveying the title, where it does not contain the terms of the trust, but simply shows the purpose for which the conveyance was made. The bill of sale under consideration transferred the legal title to the notes described therein to the defendant. This is not denied by the plaintiff. Indeed, the foundation of his suit is that the legal title of the property is in the defendant, but that he holds it as a trustee only. The bill of sale does not declare or negative a trust; hence parol testimony is admissible to show the real purpose of the transfer, and does not vary or contradict the writing. We conclude, therefore, that the defendant received and now holds the property, or such part of the proceeds as he has not expended for the use and benefit of the plaintiff, in trust for him, and the only remaining question is as to the accounting.

3. The court below made no finding as to the money received by the plaintiff on the French note. That it was paid to him is conclusively shown by the check drawn in his favor, indorsed and cashed by him at the bank. He has no recollection as to what he did with the money, and the defendant testifies positively that no part of it ever came into his hands. Upon this issue, therefore, the plaintiff must fail. The two Warren notes have not been collected, and, although the makers are probably insolvent, the plaintiff is entitled to the possession of the notes. The Weaver note, upon which there is a balance still due, should also be turned over to him. The court below held the defendant to a strict accounting, and charged him with interest on the money collected on the Martin and Tolly note and on the Weaver note. In our opinion, however, there is not sufficient evidence to sustain this charge. A trustee is not chargeable with interest on the trust funds, unless he has used them for his own profit, or invested them so as to produce interest, or suffered them to lie idle when they might have been invested, or needlessly delayed settlement and surrender of the property, or in some other way shown a want of diligence and good faith: 27 Am. & Eng. Ency. Law (1 ed.), 179. It has not been established here, however, that the defendant ever received any interest on the money, or that he invested it, or was negligent in not doing so, or converted it to his own use. Under such circumstances, we do not think he should be held to a strict accountability, and charged with interest on the fund.

The credits allowed him by the court below are, in our opinion, in accordance with the testimony. His claim for money paid for the board of plaintiff prior to the transfer to him of the notes in question is not borne out by the evidence. There is nothing to show how much money he expended on that account, or for what length of time he

paid the plaintiff's board. Plaintiff had ample means with which to pay his own board, and there is no reason adduced why he did not do so. In addition to this, a short time before the transfer the defendant borrowed \$450 of the plaintiff, on which he afterwards made some payments of interest, without claiming that the plaintiff was indebted to him in any sum. All this is inconsistent with his present position. The decree of the court below will therefore be modified by eliminating the charge for interest on the money collected from the Martin and Tolly note and the Weaver note, and in all other respects affirmed.

MODIFIED.

Argued 18 March, decided 30 March, 1903.

STATE v. HOUGHTON.

[71 Pac. 982.]

43 125!
845 111;

CRIMINAL LAW — IDENTIFICATION OF PHOTOGRAPH AS HEARSAY.

1. Testimony that a prosecuting witness recognized a photograph of defendant as that of the person whom he desired to complain against is hearsay and inadmissible.

HEARSAY EVIDENCE — HARMLESS ERROR.

2. Where a witness was erroneously permitted to testify that a prosecutor recognized defendant's photograph at the police station as a photograph of the person who he claimed had committed a crime, and there was subsequent testimony tending to show that defendant's photograph was in the rogues' gallery because of his having committed other crimes, the error was not harmless.

EVIDENCE OF OTHER AND DISCONNECTED CRIMES.

3. It is reversible error to admit in a criminal case evidence that defendant had committed other crimes in no way connected with the one charged.

ERROR MADE HARMLESS BY OTHER EVIDENCE.

4. Error in admitting detailed evidence of hearsay matters is not rendered harmless by evidence of the same matter given without objection, but in a cursory way as an incident of a greater story and without details or emphasis.

From Multnomah: ARTHUR L. FRAZER, Judge.

Charles, better known as "Chick" Houghton, was convicted of an assault with intent to rob, and appeals.

REVERSED.

For appellant there was a brief over the names of *Wilson T. Hume* and *Chas. F. Lord*, with an oral argument by *Mr. Hume*.

For the state there was a brief over the names of *John Manning*, District Attorney, and *Arthur C. Spencer*, with an oral argument by *Mr. Spencer*.

MR. JUSTICE BEAN delivered the opinion.

The defendant was charged with the crime of robbery from the person of one Balch, by assault and putting in fear, and upon his trial was convicted of an assault with intent to rob. Balch was assaulted by three men, and robbed of a check for \$7, and \$20 to \$25 in money, about 11 o'clock on the night of November 7, 1902, on a street in the "North End" of the City of Portland. A short time before the robbery he was in the Mint saloon, and while there received change for a twenty-dollar gold piece. Several persons, strangers to him, were in the saloon at the time, one of whom he testifies was the defendant. After receiving his change he went out on the street, where he was accosted, as he says, by the defendant, who inquired if he was a stranger in town, and, receiving an answer in the affirmative, said that he was also a stranger, and suggested that they walk around and see the town together. They soon after started, and had gone but a short distance when two persons suddenly stepped out in front of them, and, with the aid of defendant, as Balch testifies, committed the robbery. Balch immediately reported the crime to the police. At the trial he testified, without objection, that the morning after the robbery he recognized a photograph of the defendant at the police station as being that of one of the persons engaged in the commission of the crime. Joseph Day was thereupon called as a witness for the prosecution, and, after testifying that he was a member of the detective force, and detailed to inquire into the commission of this particular offense, stated that Balch described to him one of the men engaged in its commission, and said that he would know him if he saw him;

that he asked Balch if he thought he would recognize the picture of the man, and took down the book belonging to the office, containing photographs of sundry persons. Objection was made to this testimony because it was hearsay, but the objection was overruled, and the witness continued: "I took down the book, and turned over, page by page, from A, B, C, all through, and let him look at the pictures, and he came to Houghton's picture, and he said, 'That is the man.'" A motion was thereupon made to strike out this evidence, and the district attorney remarked that he had no objection. The court, however, ruled that it might be stricken out if the district attorney consented, but that, in his opinion, it was competent. Exception was taken to the ruling as to the competency of the testimony, when the court remarked: "I think the fact that he was able to pick out his picture is material evidence in this case." The motion to strike out was renewed and overruled.

The defendant, testifying in his own behalf, among other things, in response to questions of his counsel, said that his picture had been taken and was at the station because he would not act as a "stool pigeon" for Detective Day; that he was walking along the street one day, when the detective seized him, took him to the station, and had his picture taken, without any charge having been preferred against him. On cross-examination he was asked: "You say that Joe Day just walked out on the street, and run you into the station, and took your photograph in the gallery? A. That is exactly what he did. Q. I will ask you if it is not a fact, and that you know it, that the reason that picture was taken was because you held up a man at the point of a gun, and another man robbed him, and you ran up into a house and jumped out of the window, and as soon as they arrested you they had your photograph taken?" Objection was made to this question, and the

court requested to instruct the jury to disregard it, but the request was denied, and the examination proceeded: "Q. I will ask you if it is not a fact that you saw Joe Day in Seattle, near the corner of Second Avenue and Yesler Street, and when you saw him you ran and hid in a stairway? A. No; I did not. Q. You did not see him over there at all? A. No, sir; I did not. Why should I run from him? Q. Probably you know. * * You did not resist the taking of that picture, did you? A. Yes; I did. I told them they had no right to take that picture; I was not arrested for nothing; that I could not walk down the street; it was a funny thing, when I was not arrested, that I could not turn a corner but what Joe Day was near at hand." Objection was made to this question, but overruled by the court. "Q. You know that a little while before that you had stolen \$200?" An objection was sustained to this question but the witness answered, "It ain't so;" and upon motion this was stricken out, and the jury instructed to disregard it. Day was subsequently called in rebuttal, and was interrogated by the district attorney and answered as follows: "You heard the explanation of Houghton about taking his picture? A. Yes; I did. Q. I wish you would explain the circumstances of taking that picture." The question was objected to because it was irrelevant and immaterial, but the objection was overruled, and the examination proceeded: "Q. State whether or not the picture was taken because of any robbery or crime the defendant, Houghton, had committed? A. Yes. Q. What was the crime he had committed?" Objection was made to the last question, and it was not insisted upon by the district attorney.

1. The admission of the testimony of Detective Day that the prosecuting witness, Balch, the morning after the robbery, identified the photograph of the defendant in the rogues' gallery at the police station as that of one of the

parties engaged in the commission of the crime, the admission of the testimony as to when and under what circumstances the defendant's photograph was taken, and the ruling of the court on his cross-examination in reference thereto, are all made the basis of separate assignments of error. Without noticing the assignments in detail, however, it is clear that they are of such a character as to require a reversal of the judgment. The testimony that Balch identified the defendant's photograph as that of one of the guilty parties was mere hearsay, and, under the circumstances, prejudicial to the defendant. The crime for which he was being tried was committed at night, and, as he was a stranger to the prosecuting witness, an important and material question in the case was whether Balch was able to identify him as one of the guilty parties. The fact that the next morning Balch was shown by the detective a photograph of the defendant, and identified it as a picture of one of the parties concerned in the commission of the crime, was damaging testimony, in view of the ruling of the court that it "was material evidence in the case." It amounted to nothing more than an identification or description of the culprit, and, as it was not in the presence of the defendant, was hearsay evidence and incompetent. This is in accordance with oft-repeated holdings of the courts. Thus, in *People v. Johnson* 91 Cal. 265 (27 Pac. 663), and *People v. McNamara*, 94 Cal. 509 (29 Pac. 953), the testimony of an officer as to the description of the culprit given him by the prosecuting witness before the arrest in each instance was held to be hearsay, and its admission prejudicial error, for which the cases were reversed. Again, in *Murphy, alias Jones v. State*, 41 Tex. Cr. R. 120 (51 S. W. 940), it was held that on a trial for murder it was incompetent and inadmissible, as original evidence, to prove by a witness who was present at the killing,

and only saw defendant for an instant at that time, that subsequently she picked him out and identified him at the jail, among several other inmates, as the person who committed the murder. So, also, in *Commonwealth v. Fagan*, 108 Mass. 471, evidence that the person who was robbed described the robber to the officer, and that the officer thereupon went in search of the defendant, was held hearsay, and not admissible to identify the robber with the defendant. And in *O'Toole v. State*, 105 Wis. 18 (80 N. W. 915)—a case somewhat similar to the one at bar—two policemen testified to the effect that the prosecuting witness on the day after the robbery stated that plaintiff in error was the man who committed it; but the court held the admission of such testimony error, saying: "It was placing before the jury an unsworn declaration under circumstances likely to give it great weight. The darkness and confusion surrounding the robbery justified an argument upon the improbability of the prosecutor's ability to have seen his assailant sufficiently to identify him, and the declaration of defendant's identity when presented among others before complainant must be weighed with the jury upon the facts so declared, and therefore prejudiced the accused. Error was thus committed for which the judgment must be reversed." The admission of the testimony that the prosecuting witness recognized defendant's photograph at the police station the morning after the robbery as that of one of the parties engaged in its commission was therefore error.

2. Nor was the error harmless, as it brought prominently before the jury the fact that the defendant's picture was in the rogues' gallery, presumably because of the commission of other crimes by him, or because he was regarded by the police as a common criminal, which, in connection with the nature of his subsequent cross-examination, practically amounted to an attack on his general character.

3. In addition to this the testimony concerning the commission by him of other distinct crimes was in no way connected with that for which he was on trial, thus violating a universal rule of law.

4. Neither was this error cured by Balch's testimony, admitted without objection. Balch did not go into details, and his evidence on this subject could perhaps be regarded only as a circumstance attending the search for the guilty parties. When Day was called, however, the entire matter was gone into, over the objection of the defendant, and under the ruling of the court that such evidence was material testimony against him.

As these views require a reversal of the judgment, it is perhaps unnecessary to consider whether the crime of which the defendant was convicted was included in the one charged in the information; but it is difficult to understand how robbery from the person by assault and putting in fear could be committed without an assault with an intent to rob.

The judgment is reversed, and a new trial ordered.

REVERSED.

Decided 8 June, rehearing denied 8 August, 1903.

SLATER v. LA GRANDE POWER CO.

[72 Pac. 738.]

ARBITRATION AND AWARD—NOTICE OF MEETING OF ARBITRATORS.

A submission was made to two arbitrators, with power to choose a third. The parties appeared before the two, and made statements of their claims. The two, failing to agree, chose a third, who, without examining the work to be passed on, met with the other two. The arbitrator appointed by plaintiff withdrew without his knowledge, and the others made the award. *Held*, that notice to the parties of the meeting by the three was necessary to give jurisdiction, and, none having been given, and plaintiff not having known that the arbitrator appointed by him had withdrawn, the award was void, though the parties knew the arbitrators were in session after the third was chosen.

From Union: ROBERT EAKIN, Judge.

Suit by J. L. Slater against the La Grande Light & Power Company and others to foreclose a lien. The facts are that

after plaintiff had commenced to furnish the material and to construct a dam in the Grande Ronde River for the defendant under an agreement that he was to receive therefor the sum of \$6,300, the plan and specifications were modified, increasing, in some particulars, the labor and material, diminishing the size of the dam, and relieving the plaintiff from filling a crib with rock, it being understood that he was to be paid the reasonable value of the extra labor and material necessitated by the change, and that defendant should be credited with the cost of filling a crib of the dimensions specified in the contract, and also with the value of the material saved by the modifications of the plan. The dam having been completed January 12, 1901, the plaintiff, about three days thereafter, presented a bill therefor, which, omitting details, is as follows:

To contract price of dam.....	\$ 6,300 00
To extras: 33,024 ft. lumber (@ \$15 per M.....	495 00
876 feet (@ \$10 per M.....	8 76
Labor	153 50
Drift bolts.....	18 75
Driving piling.....	80 00
Total	\$ 7,056 01
By 434 cu. yds. stone placed in crib (@ 50c per yd....	\$ 217 00
10 cu. yds. placed in apron (@ 80c per yd.....	8 00
Lumber saved by change of plan, 4,916 feet, (@ \$15 per M.....	73 74
Cash received.....	5,500 00
Balance due	1,257 27
Total	\$ 7,056 01

The defendant's agents being dissatisfied with the account rendered, it was orally agreed that all matters outside the original contract should be submitted to arbitrators, one to be chosen by plaintiff, another by the defendant, and, if they could not agree, a third should be selected. In pursuance of such agreement, plaintiff chose C. R. Thornton, and the defendant E. J. Stuart, and, upon their dis-

agreement, J. S. Scranton was appointed, who, in a few days thereafter, met with the others. Thornton soon thereafter, and without plaintiff's knowledge, withdrew, whereupon Stuart and Scranton signed a memorandum, in which they found that there was due from the defendant to the plaintiff the sum of \$1,136.16, which he refused to accept, and on March 6, 1901, filed a claim of lien to secure the sum of \$1,360.62, and instituted this suit for its foreclosure. The answer admits that the dam was constructed, but denies that the sums demanded for extra labor and material are reasonable, sets up the alleged award, and avers a tender to plaintiff of the sum found by the arbitrators to be due him, which it deposited for him with the clerk of the court. For a further defense the original contract is set out, and it is alleged that under its terms plaintiff was required to drive sheet piling in a specified manner, but that he performed that part of his agreement so negligently that defendant was damaged thereby in the sum of \$250. The reply admits the agreement to arbitrate the matters in dispute, avers that plaintiff revoked the submission before any award was published, and denies the other material allegations of new matter in the answer. The cause, being at issue, was referred to H. R. Hanna, who took and reported the testimony, from which the court found the facts, in effect, as hereinbefore stated, and, having concluded, as a matter of law, that the submission and award were valid and binding upon the parties, rendered a decree dismissing the suit, and plaintiff appeals.

REVERSED.

For appellant there was an oral argument by *Mr. Robert J. Slater*, with a brief over the names of *J. D. Slater* and *R. J. Slater* to this effect:

The award is void because the third arbitrator did not hear the statements of the parties and took no evidence in the matter and did not notify either of the parties to be

present and make a statement or produce evidence, and the plaintiff was not present and had no opportunity to make any statement or produce evidence: *Falconer v. Montgomery*, 4 U. S. (4 Dall.) 232; *Parsons v. Pettit*, 4 U. S. (4 Dall.) 27; *Day v. Hammond*, 57 N. Y. 479 (15 Am. Rep. 522); *Haven v. Winnisimmet Co.* 11 Allen, 377 (87 Am. Dec. 723); *Ingraham v. Whitman*, 75 Ill. 30; *Elmendorf v. Harris*, 23 Wend. 628 (35 Am. Dec. 587); *Bulson v. Lohnes*, 29 N. Y. 291; *Daniel v. Daniel*, 9 Dana, 93; *Frissell v. Ficks*, 27 Mo. 557; *Walker v. Walker*, 28 Ga. 140; *Small v. Courtney*, 1 Brev. (S. Car.) 205; *Coon v. Coon*, 95 Va. 434 (64 Am. St. Rep. 804); 3 Cyc. 640.

For respondents there was a brief and an oral argument by *Mr. J. W. Knowles* to this effect:

Unless a parol submission to arbitration is unconditionally revoked before the award is made, it is binding upon the parties even where one of the parties refused to reduce the submission to writing: *Dilks v. Hammond*, 86 Ind. 563; Notes in 2 Am. & Eng. Ency. Law (2 ed.), p. 597, and cases there cited.

After a question is referred to arbitrators, and they have acted under the reference, one of the parties cannot put an end to the contract and revoke the authority of the arbitrators by an expression of a determination not to stand by the agreement. Such declarations are nugatory unless the party expressly revokes the authority of the arbitrator: *Brown v. Welcher*, 1 Cold. (Tenn.) 197.

After an award is once made the submission cannot be revoked by either without the other's consent: *Union Ins. Co. v. Central Trust Co.* 13 N. Y. Supp. 17; 2 Am. & Eng. Ency. Law (2 ed.), p. 597; *Toby v. Preston*, 3 Story, 800.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion.

It is contended by plaintiff's counsel that their client

having no notice of the time and place of hearing before the arbitrators after Scranton's appointment, and not having waived his right to appear before them and offer his evidence, any conclusion they may have reached in respect to the sum due either party is void, and, this being so, that the court erred in dismissing the suit, and in not foreclosing the lien for the sum prayed for in the complaint. The transcript fails to show that any notice was ever given to the plaintiff of the time and place of hearing before the three arbitrators, or that he ever in any manner waived the right to be heard, though he knew they were in session after Scranton met with the others, but did not know that Thornton had withdrawn until the award had been made by the other two. The plaintiff and the defendant's agents went before Thornton and Stuart prior to their disagreement, and made statements concerning their respective claims against each other; but neither party appeared or offered any evidence after Scranton was selected. Thornton being an architect, Stuart a mechanic, and Scranton a millwright, it might reasonably seem to be inferred from their several qualifications that they were selected because of their peculiar knowledge of the matters submitted to them, so that a hearing was thus made unnecessary (Morse, Arb. p. 143; *Stemmer v. Scottish Ins. Co.* 33 Or. 65, 49 Pac. 588, 53 Pac. 498; *Wiblerly v. Matthews*, 91 N. Y. 648); but, as the parties appeared before and made statements of their respective demands to Thornton and Stuart prior to their disagreement, any inference that might seem to be deducible from the special qualifications of the arbitrators is dispelled. This conclusion is strengthened by the fact that Scranton never inspected the work so as to qualify himself to determine the reasonable value of the labor performed or material furnished, for on cross-examination, in answer to the question, "Did you go up there and examine that dam?" he

said, "No, sir; I have been over the dam two or three times, but never went to examine it." In *Falconer v. Montgomery*, 4 U. S. (4 Dall.) 232, a submission having been made to two arbitrators with power to choose an umpire if they disagreed, an umpire was appointed, who received a statement of the case from the arbitrators, in the absence of the parties, and without giving them a hearing, and it was held that the award should be set aside; the court saying: "The plainest dictates of natural justice must furnish to every tribunal the law that 'no man shall be condemned unheard.' It is not only an abstract rule or positive right, but it is the result of long experience and of a wise attention to the feelings and dispositions of human nature."

The rule in this country is quite general that, in the absence of any stipulation of the parties regulating the matter, the duty of giving notice of the time and place of hearing upon the submission of a controversy devolves upon the arbitrators, but the manner of giving it, so long as it is reasonably adequate to accomplish the purpose for which it was designed, rests largely in their discretion: *Morse*, Arb. p. 118. In *Wood v. Helme*, 14 R. I. 325, a dispute concerning a building contract was submitted to two arbitrators under a stipulation that, if they could not agree, they were to choose a third, the decision of any two of them to be final. A disagreement having occurred, a third arbitrator was chosen, who, in company with one of the others, visited the premises, and heard *ex parte* statements from the defendant's brother concerning the matter submitted, in the absence of the plaintiffs, and without notice to them. An award having been made, it was set aside as void, the court, in speaking of the duty of arbitrators under a submission silent in respect to notice, saying: "Without question it was the duty of the arbitrators, under the submission in this case to give due notice to the parties

of the time and place of hearing the cause before proceeding therein." Further in the opinion it is said: "And it makes no difference in this respect that there has been a regular hearing in the case before the two arbitrators originally chosen, who were unable to agree, and thereupon called in a third person; for the proceeding then commences *de novo*, and the parties are entitled to the same notice as though no proceeding had been previously had." In *Day v. Hammond*, 57 N. Y. 479 (15 Am. Rep. 522), a controversy was submitted to two arbitrators in pursuance of like terms, and, a disagreement having resulted, a third arbitrator was chosen, who, with one of the others, made an award without hearing the parties, and it was held that the failure to have a rehearing upon due notice to them rendered the award invalid, the court saying: "There is no necessity to take proceedings in equity to set the award aside." In the case at bar the plaintiff never received any notice from the arbitrators, after Scranton was appointed, of the time or place of hearing, though he knew they were in session in the office of the defendant company. He had no knowledge, however, that the arbitrator selected by him had withdrawn, or refused to consider the matters submitted to him and his associates. The right to hear and determine the subject-matter in proceedings of this character is conferred by the submission, while jurisdiction of the parties, in the absence of any stipulation, prescribing the time and place of hearing, or of any waiver thereof, is secured by notice to them from the arbitrators. Thornton and Stuart having failed to agree, Scranton, upon being selected and accepting the appointment, *ipso facto* became a member of a new board of arbitrators, the hearing before whom was a trial *de novo* upon the merits of the controversy: *Wood v. Helme*, 14 R. I. 325. True, the plaintiff knew the arbitrators were in session when Scranton undertook the performance of the duty incident to an

acceptance of his appointment, but, as he assumed that he was being represented by Thornton, who, without his knowledge, withdrew from the conference, and as jurisdiction of the person is secured by notice of some character, emanating from the arbitrators, their failure to notify him of the time and place of the rehearing, so as to afford him an opportunity to introduce his evidence and to make an argument in support thereof, if he so desired, renders the award void, and, this being so, it may be challenged in a collateral proceeding when an opportunity offers, such as this suit affords: *Day v. Hammond*, 57 N. Y. 479; *Elmendorf v. Harris*, 23 Wend. 628 (35 Am. Dec. 587). Having reached the conclusion that the award is void for lack of notice, it is unnecessary to consider other reasons assigned by plaintiff's counsel as grounds for setting it aside.

Having found that the court erred in dismissing the suit, there remains to be ascertained the amounts due the plaintiff for the extra labor and material necessitated by a change in the plans and the credits to which the defendant is justly entitled for causing the rock to be furnished for the crib, the value of the material saved by reducing the size of the dam, and the damage, if any, that it sustained in consequence of the manner of driving the sheet piling. It will be remembered that the bill presented by plaintiff to the defendant shows that the extra lumber used was 33,024 feet and 876 feet, at \$15 and \$10, respectively, per M, amounting to \$503.76, an undervaluation of 36 cents. The quantity specified in the complaint, as evidenced by the notice of lien, is stated to be 16,936 feet, at \$15 per M, which sum is made up as follows: \$10 per M for the lumber, \$3.50 per M for the labor, and \$1.50 per M for the nails and drift bolts used in putting the material in place, or \$254.04; 15,360 feet at \$16.75 per M, this amount being \$11.35 per M for the lumber, \$3.50 per M for the labor employed, and \$1.90 per M for the nails and

drift bolts used therein, or \$274.03—evidently an erroneous overcharge of \$16.75; and 1,604 feet at \$10 per M, or \$16.04—making in all the sum of \$544.11, a difference of \$40.35 between the bill as rendered, in respect to this item, and the sum demanded in the complaint. The following items stated in the complaint do not appear in the bill rendered, to wit: To excess of rock in pier, 120 cubic yards, at 50 cents per yard, \$60, and to sizing timber for flood gates, \$3, thus claiming the sum of \$103.35 in excess of the original bill. The plaintiff, as a witness in his own behalf, testifies that the charge of \$15 per M in the bill as originally rendered was made for the extra lumber used, and was intended to include the item of 15,360 feet of that material for which he now demands \$16.75 per M; saying: "This bill was put in in the attempt to get a settlement as a sort of a compromise. There was a chance for a difference between us. I made out that bill, and made it just as low as I possibly could, and gave it in to them." He says, however, that prior to presenting it there had been no dispute concerning any item thereof. He further testifies that he gave the defendant credit for 434 cubic yards of stone at 50 cents per yard, which it caused to be placed in a pier, this being 120 cubic yards in excess of that to which it was entitled, thus crediting it with \$60 too much by mistake, for which he should have credit. The original contract provided for the construction of a pier 64 feet long, 4 feet wide, and 24 feet high, but by the modified agreement it was built 44 feet long, 14 feet wide, and 24 feet high, using timbers 10 inches thick and having 5 cross-tiers, which required 434 cubic yards of rock to fill, or 120 cubic yards in excess of that necessary to fill a pier of the dimensions prescribed in the original specifications. The plaintiff, on cross-examination, in speaking of his reasons for omitting this \$60 charge, says, "Well, I left it out partly because I overlooked it, and

partly because I wanted to keep the bill to get a settlement." The plaintiff, explaining the charge of \$3 for re-adjusting timbers used in the flood gate, testifies as follows: "They had plans drawn for certain kinds of lifts, but when the irons came they required different sized timbers, so I sized them down by hand, and charged them for it." In explaining how he omitted this item from the original bill, he says: "I overlooked it. I told Mr. Palmer (the president and general manager of the defendant company) that there was other things I was entitled to. Q. You didn't keep that sum out to save a law suit? A. I kept it out to try and get a settlement." The plaintiff further testifies that the charges on account of the several items specified in the notice of lien and demanded in the complaint, together with the credits to the defendant, are reasonable, and that there is due him from it, over and above all payments and credits, the sum of \$1,343.37.

The specifications prescribing the kind of material to be furnished and the character of work to be performed in constructing the dam were in typewriting, one clause of which is as follows: "Planking and sheathing to be tamarack, two thicknesses, 2x12, laid to break joints on the face ribs of the dam cribs and apron and spiked thereto." A punctuation mark in the language quoted is made with graphite, and the plaintiff, referring thereto, says: "The comma in pencil has been put in between the two words 'dam' and 'cribs' since these specifications left my hands, if these are the same ones." E. J. Stuart, as defendant's witness, speaking of this clause, and also referring to plaintiff's bill, as rendered, for 1,400 feet and 1,650 feet of 1x12-inch lumber used on the north and south piers of the dam, respectively, for which a charge of \$15 per M is made, says that this material was not extra, and plaintiff was required to furnish it at his own expense, under the terms of the contract. The testimony of this witness is

corroborated by that of Joseph Palmer and W. G. Masterton. It would seem to be implied from the absence of the comma in the clause quoted that under the specifications, as originally prepared, the piers were not to be sheathed, and that a distinction is made between the words "piers" and "cribs;" the latter only, when forming a part of the dam, to be planked under the contract, though Masterton says the words are synonymous. If this be so, the comma must have been inserted in the specifications when the contract was entered into; but we think from plaintiff's testimony that the change was made therein afterwards, and for this reason he will be allowed compensation for this lumber as extra material.

It will be remembered that plaintiff seeks to recover \$15 per M for 16,936 feet, \$16.75 per M for 15,360 feet, and \$10 per M for 1,604 feet of extra lumber furnished, the prices respectively demanded therefor including the cost of the lumber, nails, and drift bolts, and also the value of the labor employed in placing the material in the structure. Stuart and Scranton estimate the reasonable value of the lumber so used, including nails, drift bolts, and labor, at \$14 per M. The plaintiff, testifying in relation to the charge of \$16.75 per M, says that in changing the pier from 4 to 14 feet in width he was obliged to use 16-foot timbers which he had ordered, and could not secure material therefor that was of the proper length, thereby causing a waste, for which he made the extra charge of \$1.35 per M. We think the preponderance of the testimony shows that the reasonable value of the material furnished was only \$14 per M, including nails, drift bolts, and labor, and this sum will be awarded for 32,296 feet, and \$10 per M, the sum demanded, for 1,600, an error of 4 feet having been made in the computation as set forth in the complaint. The waste claimed, as we understand the matter, is not so much as stated. There are five cross-

tiers, 14 feet long, in the pier as changed, and if material 16 feet in length were used, there would be a waste of 2 feet. The timber used was laid 10 inches thick, thereby causing a waste of 2,400 feet, for which an allowance of \$24 is made in addition to the above.

It will be remembered that the sum demanded for driving the piling is \$80. We think the weight of the testimony shows that the reasonable value of this work was only \$56, which sum will be allowed therefor. For the extra drift bolts furnished, \$18.75, and the value of the extra labor employed, \$353.50, and for sizing the timber for the flood gate, \$3, will be allowed on said items respectively. The defendant is credited with 434 cubic yards of stone placed in a pier at 50 cents per cubic yard, or \$217, and plaintiff, in the complaint, makes a counter charge of 120 cubic yards at the same price, or \$60. The defendant should only be credited with filling a pier 64 feet long, 4 feet wide, and 24 feet high, the dimensions of the one agreed to be filled by plaintiff, or 314 yards. We think the weight of the testimony shows that the reasonable value of this work was 75 cents per cubic yard, which sum will be awarded therefor.

The contract required plaintiff to drive in the bed of the river a row of sheet piling, the top part of which was to be spiked to the dam, and it is alleged in the answer that this work was so carelessly done that defendants were damaged thereby in the sum of \$250. The witness J. D. McKennon, in answer to the question as to how much damage defendant sustained in this respect, testifies as follows: "That is a hard question to answer. We cannot really estimate the damage that that has done us by reason of their not being driven according to the plans and specifications. It has cost a great deal of money to stop the leaking, which is certainly caused by reason of the fact that the piles are not driven close together. It does not

stop the flow as it would have if they had been driven in a perfect line according to the plans and specifications." The witness Joseph Palmer, in answer to a similar question, says: "Well, I could not possibly estimate the damage—how much it is. We have no water in the summer time on account of the leakages." We think this evidence too indefinite to base any conclusion thereon in respect to the amount of damage sustained by the defendants, and hence the claim therefor will be disallowed.

It is stated in defendants' brief, and not controverted at the trial, that plaintiff secured from the county clerk the sum of \$1,136.16, deposited for him. This being so, the account will be recast as follows:

Contract price of dam.....	\$ 6,300 00
To 32,296 ft. extra lumber (@ \$14 ¢ M.....	452 14
1,600 ft. extra lumber (@ \$10 ¢ M.....	16 00
Waste	24 00
Labor	153 50
Drift bolts.....	18 75
Driving piling.....	56 00
Sizing gate.....	3 00
Total	<u>\$ 7,023 39</u>
By 314 cu. yds. stone (@ 75c ¢ cu. yd.....	\$ 235 50
10 cu. yds. (@ 80c.....	8 00
Lumber saved, 4,916 feet, (@ \$14 ¢ M.....	68 82
Cash paid.....	5,500 00
Cash deposited.....	1,136 16
Balance due.....	74 91
Total	<u>\$ 7,023 39</u>

This shows that plaintiff is entitled to recover the sum of \$74.91, and the further sum of \$1.50 which the testimony shows he paid for filing the lien. The decree of the court below will therefore be reversed, and one entered here foreclosing the lien for the sum so found to be due.

REVERSED.

43 - 144
448 421

Argued 24 March, decided 6 April, 1908.

CRANOR v. ALBANY.

[71 Pac. 1042.]

MUNICIPAL CONTROL OVER SALES OF LIQUORS ON SUNDAY.

1. A municipal power to "regulate, restrain and prohibit" the sale of liquors necessarily includes the power to make and enforce any reasonable rules in reference thereto, of which an inhibition of Sunday sales is an instance.

MUNICIPAL CONTROL OVER LIQUOR SELLING—STATUTES.

2. A municipal power to "regulate, restrain and prohibit" the sale of liquors, provided that each applicant for a license shall present a bond of a certain amount and with certain conditions, is not limited by the terms of the proviso, except as to the conditions under which a license may be granted,—in other words, the power conferred may be exercised otherwise than by licensing.

INFORMATION—DUPLICITY—CONJUNCTIVE ALLEGATION.*

3. Where a statute or a city ordinance prohibits the doing disjunctively of any of several stated acts, the information may charge the commission of all the acts conjunctively.

CONSTITUTIONAL RIGHT TO A JURY TRIAL.

4. The right of trial before a jury secured by constitutional provisions† is the right as it existed when such provisions were adopted, and does not include minor offences before justices and police magistrates, such as violations of city ordinances regulating the sales of liquors.

APPEAL—PRESUMPTION AGAINST ERROR.

5. Where the transcript does not contain all the record necessary to the determination of a disputed question, it will be presumed that there was no error: for example, in the absence of the city ordinances it will be presumed, in favor of the judgment below, that there was an ordinance authorizing the court to tax against an accused person the costs of a successful liquor prosecution.

From Linn: REUBEN P. BOISE, Judge.

The appellant, H. L. Cranor, was arrested under a warrant issued out of the Recorder's Court of the City of Albany, charged with the violation of a city ordinance which provides, among other things, that, if any person duly licensed to engage in the sale of spirituous, fermented, malt, or vinous liquors within the city "shall sell, give away, or in any manner dispose of, or suffer, permit, or allow to be sold, given away, or in any manner disposed of, on the first day of the week, commonly called Sunday, any spirituous, fermented, malt, or vinous liquors," he shall, upon conviction thereof before the recorder's court, be punished by a fine of not less than \$50 nor more than \$100,

*NOTE.—See, also, *State v. Humphreys*, 43 Or. 44.

REPORTER.

†Const. U. S. Sixteenth Amendment; Const. Or. Art. I, § 11.

or by imprisonment in the city jail for not less than twenty-five days, nor more than fifty days, or by both such fine and imprisonment, at the discretion of the court. The information upon which the warrant was issued charges, in substance, that on the twenty-sixth of January, 1902, the plaintiff, at his saloon in the City of Albany, did willfully and unlawfully, "on said date, the same being the first day of the week, commonly called Sunday, sell, give away and dispose to one O. M. Hickey one half pint of whisky, the same being spirituous, fermented, malt, and vinous liquor, and received therefor the sum of twenty-five cents (25c.), he, the said defendant, then and there being duly licensed to engage, and was engaged, in the sale of spirituous, fermented, malt, and vinous liquor within the said City of Albany, contrary to the ordinance in such cases made and provided, and against the peace and dignity of the city." A demurrer to the information on the grounds (1) that it stated more than one cause of action, (2) that the court had no jurisdiction of the crime or misdemeanor charged therein, and (3) that it did not state facts sufficient to constitute a cause of action, was overruled. The appellant thereupon entered a plea of not guilty, and moved the court for a trial before a jury, which motion was also denied. A trial before the recorder resulted in a judgment of conviction and a sentence that the appellant pay a fine of \$50 and the costs and disbursements of the action, taxed at \$9.85. He afterward brought the record before the circuit court by a writ of review, where the judgment was affirmed, and he appeals.

AFFIRMED.

For appellant there was a brief over the names of *W. R. Bilyeu* and *Laufin M. Curl*, with an oral argument by *Mr. Curl*.

For respondent there was a brief over the names of

Weatherford & Wyatt and *Hewitt & Sox*, with an oral argument by *Mr. J. R. Wyatt*.

MR. JUSTICE BEAN, after stating the facts in the foregoing words, delivered the opinion of the court.

1. It is contended, first, that the ordinance for the violation of which the plaintiff was arrested, tried, and convicted is invalid, because not within the power of the city to enact. By subdivision 9 of section 34 of the charter of Albany (Sp. Laws 1901, p. 314), the common council is given power and authority "to tax, license, regulate, restrain, and prohibit the sale of spirituous, vinous, or malt liquors, bars, barrooms, drinking shops, and tippling-houses," etc., provided that each applicant for a license shall present to the council at the time of making application a bond in the sum of \$1,000, with two or more sureties, conditioned that he will keep an orderly house, etc.; that no license for the sale of spirituous, vinous, or malt liquors shall issue for a less sum than is prescribed by the general laws of the state, or for a less period than six months, or more than one year, or to any woman or minor, or to any person who shall permit any woman, girl, or male minor to frequent his place of business, either as guest, servant, waiter, etc., and that if, after license shall have been granted, the person to whom it is issued, or any one in his employ, shall give or sell liquor to a common drunkard or intoxicated person, or to any woman, girl, minor, or Indian, or shall permit any woman or girl or minor to frequent or to loiter about his place, and shall be found guilty thereof before any court having jurisdiction, or shall be found guilty of violating the provisions of any ordinance that now is or hereafter may be in that behalf passed, such judgment of conviction shall be a revocation of his license, and he shall not be granted another license for the period of one year; but such revocation

shall not in any manner operate to release the person or persons to whom the same has been granted from the penalty or punishment provided by the ordinance for the violation of any of the provisions of the act. The authority to regulate, restrain, and prohibit the sale of spirituous, vinous, or malt liquor necessarily confers the power to make and enact any reasonable ordinance or regulation in reference thereto, and an ordinance inhibiting the sale of such liquor on Sunday is within the just exercise of such power. This has been so often held by the courts that we need only call attention to some of the authorities: 17 Am. & Eng. Ency. Law (2 ed.), 288; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Decker v. Sargeant*, 125 Ind. 404 (25 N. E. 458); *State v. Ludwig*, 21 Minn. 202; *Schwuchow v. City of Chicago*, 68 Ill. 444.

2. Nor is the power of the City of Albany to regulate, prohibit, and restrain the sale of such liquor limited or confined to the matters contained in the subsequent specific provisions of the section, which are in no sense restrictive of the general powers previously conferred, except in so far as they may affect the conditions under which a license may be issued and the duties of the licensee.

3. It is next urged that the information or complaint filed in the recorder's court against the plaintiff charges more than one crime, as it alleges that he did "sell, give away, and dispose" of spirituous liquor, etc. The ordinance makes it an offense for any person duly licensed to engage in the sale of spirituous liquors within the city to sell, give away, or in any manner dispose of on the first day of the week, commonly called Sunday, any spirituous, fermented, malt, or vinous liquors. Under the doctrine of *State v. Carr*, 6 Or. 133, and subsequent decisions (*State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229), it is competent for the prosecution, where the statute makes it a crime to do either of several things stated disjunctively,

to embrace the whole in a single count, using the conjunction "and" where "or" occurs in the statute, and hence the information is not open to the objection urged.

4. Next, it is insisted that it was error of the recorder's court to overrule the motion for a trial before a jury. By section 43 of the charter of Albany the recorder is given jurisdiction of all crimes and offenses defined and made punishable by any ordinance of the city, and of actions brought to recover or enforce any forfeiture or penalty, without a jury. A similar provision of a city charter was held constitutional and valid in *Wong v. City of Astoria*, 13 Or. 538 (11 Pac. 295), and this is in accordance with the general doctrine on the subject. Constitutional provisions securing to litigants the right to a trial by jury are construed as preserving the right in substance as it existed at the time of their adoption, and in the class of cases to which it then applied. They are generally regarded as having no application to the prosecution of minor and trivial offenses before justices and police magistrates, as such offenses were summarily punished at common law: 6 Am. & Eng. Ency. Law (2 ed.), 978; *Byers v. Commonwealth*, 42 Pa. 89. The section of the city charter giving the recorder jurisdiction of all crimes and offenses defined and made punishable by ordinance, and the power to try persons accused thereof without a jury, is constitutional and valid. Nor is it in any way modified or qualified by the provisions of Ordinance No. 156. This ordinance was adopted in 1887, while the charter was passed in 1901, and continued in force only such ordinances or parts of ordinances as were not in conflict with its provisions.

5. It is next contended that the recorder was in error in taxing the costs of the prosecution against the appellant. As a general rule, costs are not allowed unless pursuant to some statute. The record, however, does not contain the

ordinances of Albany that provide for the trial of persons guilty of offenses against the city, and we must, therefore, assume in favor of the judgment that the taxation was in pursuance of a valid ordinance to that effect, and we are in a measure supported by what purports to be such an ordinance printed in one of the briefs.

Finding no error in the record, the judgment of the court below is affirmed. AFFIRMED.

Decided 8 June, 1903.

POTTER v. POTTER.

[72 Pac. 702.]

43 149
146 469

CONTRACT BETWEEN HUSBAND AND WIFE—DOWER AND CURTESY.

1. A contract between a husband and his wife providing for the mutual execution of papers so that certain land owned in fee by him should become "exclusively" his, and land owned in fee by her should become "exclusively" hers, is one in relation to dower and curtesy, and is void under B. & C. Comp. § 5234, providing that, when property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them.

ENTIRE OR SEVERABLE CONTRACT*—SPECIFIC PERFORMANCE.

2. A contract between a husband and his wife by which, on payment to him by her of a stated sum of money, they were to divide their respective lands so that neither should thereafter have any interest or right in any land of the other is entire and indivisible. Such a contract cannot be enforced in any particular, since it is indivisible, and is void as to the interests to be transferred.

From Wasco: W. L. BRADSHAW, Judge.

Suit by Eleanor Potter against M. P. Potter for the specific performance of a contract to execute certain conveyances. Decree for plaintiff, from which defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Gilbert W. Phelps* and *Mr. W. H. Wilson*.

* NOTE.—See the following Oregon cases on this subject:

Entire Contracts: *Banks v. Crow*, 3 Or. 477; *Scheland v. Erpelding*, 6 Or. 258; *Sun Pub. Co. v. Minnesota Type Foundry Co.* 22 Or. 49; *Wehrung v. Denham*, 42 Or. 386; *Horseman v. Horseman*, 43 Or. 83

Severable Contracts: *Southwell v. Beezley*, 5 Or. 458; *Tenny v. Mulvany*, 8 Or. 129; *Bartel v. Mathias*, 19 Or. 482; *Russel v. Lillienthal*, 36 Or. 105; *Oliver v. Oregon Sugar Co.* 42 Or. 276.

See also, these cases, which are annotated, *Kratz v. Bedford*, 1 L. R. A. 826; *Huyett & Smith Co. v. Chicago Edison Co.* 59 Am. St. Rep. 272, 277-295. REPORTER.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Geo. H. Williams*.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to enforce the specific performance of the following agreement :

"For and in consideration of one dollar to me paid, and for the purpose of effecting an immediate sale and settlement, I, M. B. Potter, do hereby agree that on the payment to me of five thousand dollars (\$5,000.00) in cash, on or before the 14th day of September, 1901, to transfer by usual warranty deed my unencumbered interest in what is known as the Potter Place at Belmont in Hood River, Wasco, Co., Oregon, containing one hundred and forty-five (145) acres, with buildings, etc., to whomsoever my wife Eleanor Potter may designate;

Provided, that a certain 40 acres on the other side of Hood River shall become exclusively mine; and

Provided, that a certain 5 acres known as the 'Garden' shall become exclusively Mrs. Potter's; and such necessary papers as will accomplish this are to be mutually signed by us at the same time that the above-mentioned transfer of the Potter Place is effected; and

Provided, that this transaction is exclusive of the personal property in and upon the said Potter Place.

Dated at Hood River this fourth day of September, A. D. 1901. M. B. POTTER."

The plaintiff and defendant are husband and wife. At the time of making the contract, there was, and for some time prior thereto had been, irreconcilable differences between them. The contract was made for the purpose of dividing their property, and settling and adjusting their respective rights therein, with a view, as we understand it, of a final separation. The defendant owned in fee the 145-acre tract designated as the "Potter Place," and the "certain 40 acres on the other side of Hood River." The plaintiff owned in fee the five acres known as the "Garden."

1. Several defenses are made to this suit, but it is unnecessary to consider any of them, except that the contract is void because it is an agreement between a husband and wife for the relinquishment by the wife of her dower interest in her husband's real property, and the relinquishment by him of his curtesy in hers. The statute provides that "when property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them": B. & C. Comp. § 5234. This provision refers to the interest one spouse has in the land of the other, growing out of the marriage relation, and by reason of it neither can make a valid contract releasing or agreeing to release to the other such inchoate estate. It was so held in *House v. Fowle*, 20 Or. 163 (25 Pac. 376), and *Jenkins v. Hall*, 26 Or. 79 (37 Pac. 62). In the former the wife conveyed to her husband by deed, for a valuable consideration, her dower in his property, and in the latter the husband released his curtesy to his wife. In both cases it was held that the conveyances were void. In *House v. Fowle*, Mr. Chief Justice STRAHAN, speaking for the court, said: "This construction (of the statute) excludes estates or interests growing out of the marriage relation from the classes of property concerning which a husband and wife may contract with each other. They include dower and estates by curtesy. The reason of the distinction is obvious enough. These estates have their origin in public policy. They tend to strengthen the marriage relation, and to some extent they preserve to the survivor valuable property interests, which may enable him or her to enjoy some of the fruits of their joint lives, and in a measure render them independent of the vicissitudes of fortune." The provisions of our statute are identical with those of Iowa on the same subject. Prior to the enactment of the Iowa statute, the courts of that state held that a husband and wife could, under an agreement of separation, relin-

quish dower or curtesy interests in property belonging to each other: *Robertson v. Robertson*, 25 Iowa, 350; *McKee v. Reynolds*, 26 Iowa, 578. But the statute was passed to change the rule, and after its enactment it was held that such an agreement was void: *Linton v. Crosby*, 54 Iowa, 478 (6 N. W. 726). It is clear, therefore, that the provision in the contract now under consideration, agreeing that the 40-acre tract should become "exclusively" the property of the defendant, and the 5-acre tract "exclusively" the property of the plaintiff, is null and void, if it relates to the relinquishment of dower or curtesy. That the contract undertakes to deal with the plaintiff's right of dower in the defendant's property, and with his right of curtesy in hers, is, we think, apparent. Both knew that the 40-acre tract belonged to the defendant, and that the 5-acre tract was owned by the plaintiff, and that such ownership was not exclusive. They understood that each had an interest in the other's property, and manifestly it was this interest that was intended to be disposed of under the contract. In no other way could its provisions in this regard be carried out, and the 40 acres become "exclusively" the defendant's property, or the 5 acres the plaintiff's. It is true that curtesy or dower is not mentioned, but such was the only interest that either had in the property of the other, and by no other way than the extinguishment of this inchoate interest could the title become exclusive. There was no other subject-matter to which the contract could relate, and it must necessarily, therefore, have been intended to provide for the release of curtesy and dower. It certainly was not intended that the title of the 40-acre tract or the 5-acre tract should remain in its then condition, but it was evidently designed that one should become the exclusive property of the defendant, and the other of the plaintiff, and it was agreed that the respective parties would execute such papers as were necessary to accom-

plish that purpose. The papers to be thereafter prepared and executed were undoubtedly meant to be such as would operate to extinguish the defendant's right of curtesy and the plaintiff's right of dower. The law, however, inhibits husband and wife from contracting with each other in reference to dower or curtesy. That part of the contract is therefore void, and renders the whole instrument incapable of specific performance, unless its other provisions can be regarded as severable.

2. It is a doctrine well grounded in law that a contract good in part, and the residue void, when such residue is founded in illegality not *malum in se*, may be specifically enforced as to the valid part in cases where the different covenants and provisions are severable and independent of each other: *Southwell v. Beezley*, 5 Or. 458; *United States v. Bradley*, 35 U. S. (10 Pet.) *343; *Gelpcke v. City of Dubuque*, 66 U. S. (1 Wall.) 221. But where the legal and illegal provisions are not severable the entire contract must fail: *Horseman v. Horseman*, 43 Or. 83 (72 Pac. 698). A court of equity will not enforce the specific performance of a contract unless it can execute the whole contract. It will not compel a part performance: Fry, Spec. Perform. pp. 329, 334. In some instances a contract consisting of several provisions may be enforced as to one, and not the others; but in such case each provision is regarded and held as a separate and distinct contract, although embraced in one agreement. But if it appear or can be shown from the nature of the contract, or the subject-matter thereof, or the conduct of the parties, that one provision was dependent on another, it must be regarded as one entire contract, and enforced as a whole or not at all. A contract is divisible when it contains several separate and distinct items or parts in respect to matters or things not necessarily dependent upon each other, nor intended by the parties to be so. But when by the terms of the contract,

or its nature and purpose, it is contemplated and intended that each and all of the parts and provisions shall be dependent upon each other, and not separate and distinct, the contract must be regarded as entire and indivisible: *Tenny v. Mulvaney*, 8 Or. 129; *Oliver v. Oregon Sugar Co.* 42 Or. 276 (70 Pac. 902); *Wooten v. Walters*, 110 N.C. 251 (14 S. E. 734, 736); 15 Am. & Eng. Ency. Law (2 ed.), 988. As a general rule, if the consideration is single and entire, and common to all parts of the contract, the contract will be regarded as entire, although the subject thereof may consist of several distinct and independent items: 2 Parsons, Cont. (7 ed.) 520; *Miner v. Bradley*, 22 Pick. 457. Accepting these familiar and everywhere recognized rules of construction, the contract now under consideration is, we think, entire, and not divisible. From its face it appears that the consideration for the agreement of the defendant to convey the Potter place to whomsoever plaintiff might designate was not only the payment of the \$5,000, but the relinquishment also by the plaintiff of her dower interest in the 40-acre tract, so that it should become exclusively his property. The parol evidence shows that one of the conditions upon which he was willing to enter into the written contract was that the 40-acre tract should become his, and before he would agree to sign the writing he insisted that such a stipulation should become a part thereof. How much he may have been influenced in making the agreement by the consideration of obtaining title to the 40-acre tract is not apparent, nor is it material. It is sufficient that it was one of the inducing causes and a material part of the consideration for his promise to convey the other property for the plaintiff's benefit. The contract does not apportion the part to be performed, or the price to be paid for the separate and distinct items thereof, but it is one entire agreement, and the performance of each provision is contingent upon the performance

of all. The court cannot make a contract for the parties, nor attempt to apportion the consideration to its several provisions. We are of the opinion, therefore, that the contract is entire; and, since a material part of it is illegal and void, the whole must fail. The decree of the court below will be reversed, and the complaint dismissed.

REVERSED.

Argued 26 March, decided 20 April, 1903.

STATE v. McCANN.

[72 Pac. 137.]

TRIAL—CROSS-EXAMINATION.

1. On a prosecution for a felonious assault, the prosecuting witness having testified on cross-examination that he had had some difficulty with defendant over some mining claims, it was not error to exclude a question as to whether he had made some relocations whereby the defendant had been left out, for even if he had been unlawfully excluded from some rights, it was no justification for the assault, and the answer might have tended to confuse the minds of the jurymen.

STATEMENTS SUBSEQUENTLY MADE NOT PART OF THE RES GESTÆ.

2. Statements made by a prosecuting witness after the assault in question had occurred, and after the witness had been removed from the scene, are not competent evidence as part of the *res gestæ*.

CROSS-EXAMINATION—BIAS OR PREJUDICE.

3. On a prosecution for a felonious assault, statements made by the prosecuting witness afterward as to what he would have done at the time had he been armed with a gun, are not competent, since they do not tend to explain the occurrence, or to show the motives or feelings of the witness.

FOUNDATION FOR IMPEACHMENT—CROSS-EXAMINATION.

4. Though a prosecuting witness had testified in chief that he was not armed with a pocketknife, it was not error to exclude a question asked him on cross-examination as to whether he had afterward made statements as to what he would have done had he had a gun instead of a knife, as such question was not broad enough to lay a foundation for his impeachment on that subject.

INSTRUCTION ON RIGHT OF SELF-DEFENSE.

5. On a prosecution for felonious assault the evidence showed that defendant went out of his way and began to strike the prosecuting witness, calling him vile names, and drew his pistol. The latter arose, laid aside a knife with which he had been whittling, and, reaching for the weapon, followed defendant, who stepped backward and fired. *Held*, that it was not error to instruct that one cannot claim the benefit of the law of self-defense after he has intentionally put himself where he knows or believes he will have to invoke its aid; that circumstances justifying assault must be such as to render it unavoidable; and that, if defendant could have avoided any conflict, it was his duty to do so, and so render a resort to the law of self-defense unnecessary.

From Josephine: HIERO K. HANNA, Judge.

Frank McCann appeals from a conviction of assault with a deadly weapon.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. H. D. Norton* and *Mr. Robert G. Smith*.

For the state there was a brief and an oral argument by *Mr. Andrew M. Crawford*, Attorney-General, and *Mr. A. E. Reames*, District Attorney.

MR. CHIEF JUSTICE MOORE delivered the opinion.

The defendant, Frank McCann, having been convicted of the crime of assault with a deadly weapon, alleged to have been committed in Josephine County September 20, 1901, upon one David Halliday, was sentenced to imprisonment in the penitentiary, from which judgment he appeals.

1. It is contended by his counsel that the court erred in refusing to permit the prosecuting witness to answer certain questions propounded to him. It appears that McCann and Halliday had been mutually interested in some mining claims, and the latter, appearing as a witness for the state, was asked on cross-examination: "There was some little difficulty which arose between you and McCann over those claims, wasn't there?" to which he replied, "No, sir; there wasn't. Q. Did you make some relocations there—you and others—and leave McCann out?" An objection to this question having been sustained, an exception was allowed. If Halliday relocated mining claims in which he and McCann were interested, and thereby deprived the latter of all right thereto, he could, by applying to the courts, have secured redress for the wrong sustained, and had no right to resort to the use of force as a means to adjust his supposed grievance. The question concerning the relocation of the mining claims was immaterial, and as it might have misled the jury into seeking for an excuse to justify the assault, if permitted to be answered, no error was committed as alleged.

2. The prosecuting witness having been recalled by the

state, the following questions were propounded to him on cross-examination, to wit: "Mr. Halliday, I desire to ask you if after you were taken to your room from the office of the hotel, on the evening of September 20th, you said to George Hartman, who assisted you up there, in his presence and in the presence of those who were in the room, who are unknown to me, that you wished that you had a gun, instead of a knife, or words to that effect? Q. Did you say this—if you had a gun, instead of a knife, you would have done business with him—or words to that effect?" Objections to these questions were interposed on the ground that they were irrelevant and immaterial, and not cross-examination, but no ruling appears to have been made thereon by the court. "Q. I will ask you, as a matter of fact, when you followed McCann, you did not have a knife in your hand? A. No, sir. Q. I will ask you if you did not say to George Hartman, after you were taken to the room, if you had a gun, instead of a knife, you would have done business, or words to that effect?" An objection to this question on the ground that it was irrelevant and immaterial having been sustained, an exception was allowed. The defendant's counsel state in their brief that Halliday, on his direct examination, testified that at the time he was assaulted he was not armed with a knife, and maintain that the questions asked him were designed to test his credibility, to show his purpose and prejudice, and to lay a foundation for his impeachment, and hence the court erred in refusing to permit him to answer. How soon after the assault Halliday was taken to the room is not disclosed, but, as the language sought to be imputed to him was not uttered during the altercation with the defendant, what the witness might have thereafter said was no part of the *res gestæ*, and therefore not admissible on that ground: *State v. Glass*, 5 Or. 73; *State v. Garrand*, 5 Or. 216; *State v. Ching Ling*, 16 Or.

419 (18 Pac. 844); *State v. Sargent*, 32 Or. 110 (49 Pac. 889); *State v. Smith*, 43 Or. 109 (71 Pac. 973).

3. To enable the court and jury to determine the weight and value that should be given to the testimony of a witness, he may be asked on cross-examination such questions as tend to show his relation to the parties, his interest in the subject-matter of the litigation, and the motives, inclination, and prejudices that may have colored or distorted his testimony in chief: 1 Greenl. Ev. § 466; *Johnson v. Commonwealth*, 115 Pa. St. 369 (9 Atl. 78); *People v. Furtado*, 57 Cal. 345. In *Watson v. Twombly*, 60 N. H. 491, Mr. Justice CLARK, illustrating this mode of seeking to attain the truth, says: "Evidence irrelevant to the issue may be material, as affecting the credibility of the witness, when it tends to show interest, prejudice, bias, or the relationship and feelings of the witness toward the party. It is the right of a party to show the state of feeling of an opposing witness, and this may be done by cross-examination or by independent testimony. For this purpose it is competent to inquire of the witness concerning acts, declarations, and circumstances showing the existence of hostile feelings or prejudice, and the latitude of cross-examination is not restricted by the fact that the witness is a party testifying in his own behalf." The question propounded to Halliday did not relate to any bias or prejudice that he may have entertained toward the defendant at the time he appeared as a witness for the state, but it referred to an alleged expression of what he would have done to him at the time he was assaulted if he had been armed with a gun. It is usually man's disposition to forgive an injury, and though he may, in moments of anger, or while suffering from pain inflicted by his adversary, threaten to do him bodily harm, yet, when the passion subsides or the pain ceases, reason asserts its sway, and as time elapses a forgiving spirit generally ensues. The ques-

tion propounded to the prosecuting witness, having related to a threat made by him at the time he was injured, and not being calculated to elicit the state of his feelings toward the defendant at the time of the trial, was immaterial.

4. It will be remembered that the question asked Halliday implies that he had a knife, and, assuming that he testified in chief that he was not so armed at the time he was assaulted, it remains to be seen whether the court erred in refusing to permit a foundation to be laid to impeach him in this manner. A pocketknife which it is claimed the prosecuting witness possessed is a means that could have been used for offense or defense, and hence a weapon; but, as such an instrument is not generally carried for that purpose, a person might have one in his pocket, and not be "armed" with a knife. We think the word "armed," when relating to an instrument not constructed for nor usually resorted to as a weapon, must necessarily mean the manual employment of the means in such a manner as to render it available for immediate offensive or defensive use. The prosecuting witness may therefore have had a pocketknife in his possession, and not have been "armed" therewith; and, this being so, the question asked him was not, in our opinion, broad enough to lay a foundation for his impeachment upon that subject, and no error was committed in sustaining objections to the interrogatories.

5. It is insisted by defendant's counsel that the court erred in charging the jury as follows: "I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits after he had intentionally put himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that

the defendant could have avoided any conflict between himself and Halliday without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary." It is argued that this instruction is misleading, because it ignores the fact that, though the defendant may have begun the assault, he may nevertheless have endeavored to withdraw from the conflict at the time Halliday was advancing upon him with a knife as the defendant testified, and that it is also contrary to law, for the reason that it conveyed to the jury the idea that it was the imperative duty of the defendant to retire, without regard to the character of or the place where the assault was committed upon him. It appears that on September 20, 1901, McCann, having entered the corridor of a hotel at Grants Pass, where he and Halliday were guests, passed the latter, who was sitting in the room near its entrance, whittling with a pocketknife, and in a few minutes started as if to go out, but when near the door he suddenly turned and began to strike Halliday with his fists, calling him vile names, and drew his pistol. Halliday rose, laid aside his knife, as all the witnesses testify except the defendant, and, reaching for the weapon, followed McCann, who stepped backwards, and, as he attempted to grasp the pistol, McCann fired; the bullet striking him in the forehead, fracturing his skull, and coming out at the side of his head. Though McCann was a guest at the hotel, and rightfully in the room, yet in passing out of it he evidently sought to provoke a difficulty with Halliday by striking him with his fists and calling him opprobrious names and drawing his pistol; and when Halliday rose he backed away, probably expecting his adversary would follow him, and thus furnish an excuse for the use of the weapon which he held in his hand.

The right of self-defense is based upon the broad ground

of necessity, which is evidenced by a real or an apparent exhibition of force, superinducing a reasonable apprehension of imminent danger, which justifies the use of force to repel the force, but without such necessity the right to resort thereto does not exist: *State v. Morey*, 25 Or. 241 (35 Pac. 655, 36 Pac. 573); *State v. Smith*, 43 Or. 109 (71 Pac. 973). Halliday, prior to the assault upon him, made no demonstration that would lead McCann, as a reasonably prudent man, to believe that he was in any danger, immediate or remote, and hence no necessity existed for a resort to the use of force. The language employed by the court in the instruction complained of must be read in the light of the surrounding facts. It is possible that, under some circumstances, the charge might be subject to objection, for in a free country it is not expected that one person shall flee from another, and it may be that the demands of business might require one intentionally to go where he knows or has reason to believe he may be in imminent danger, and possibly compelled to resort to force as a matter of self-defense. In the case at bar, however, though it is conceded that the defendant had a right to enter the hotel, yet in passing out of it he purposely turned aside to assault Halliday. No apparent necessity existed for the course which he adopted, and he could evidently have avoided any conflict without increasing the danger to himself. If the defendant, after precipitating the attack, withdrew from the conflict, thereby evincing a determination to avoid further difficulty, the testimony fails to disclose such fact, and it was unnecessary to instruct the jury upon a theory that had no facts to support it. In *State v. Hawkins*, 18 Or. 476 (23 Pac. 475), Mr. Justice STRAHAN, in commenting upon a similar state of facts, says: "When a man is armed, and seeks another for an affray or an altercation, the law will not permit him to pro-

voke and urge on the difficulty to a point where there is an appearance of an attempt to use weapons, and then justify the aggressor in taking of life simply on the ground of apparent danger. In such case he is the aggressor, and the active cause of the danger which menaces him, and he must abide by that condition of things which his own lawless conduct has produced." The instruction, in our opinion, correctly states the law applicable to the facts involved, and no error was committed in giving it. It follows from these considerations that the judgment is affirmed.

AFFIRMED.

Decided 8 June, rehearing denied 8 August, 1903.

HILTS v. HILTS.

[72 Pac. 607.]

FILING PAPERS — PAYMENT OF FEE — STATUTES.

1. The general rule that a paper is filed when it has been delivered to the proper officer and received to be kept in the official records, does not apply where the payment of a stated fee is made a prerequisite—in the latter case the paper is not filed until the fee has been paid. Where a statute requires that a transcript, for example, shall be filed with the clerk of the appellate court by a certain time after perfecting the appeal, and that the appellant, on filing the transcript, shall pay to the clerk a stated fee in advance, the transcript is not filed until the fee has been paid, notwithstanding its delivery into the possession of the officer.

APPEAL — MOTION TO AFFIRM OR DISMISS.

2. Under B. & C. Comp. § 553, requiring the appellant to file a transcript, after which the appellate court shall have jurisdiction, and not otherwise, and providing that if the transcript is not filed within the time fixed, the appeal shall be deemed abandoned, a failure to file a transcript in time may be taken advantage of by motion to dismiss the appeal, and a motion to affirm the judgment is not the exclusive remedy.

From Union: ROBERT EAKIN, Judge.

Action by J. M. Hilts against Rachel Hilts. Judgment for defendant, and plaintiff appeals. Heard on a motion to dismiss the appeal.

DISMISSED.

Mr. J. W. Knowles for the motion.

Mr. J. D. Slater, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a motion by respondent to dismiss the appeal because (1) the transcript was not filed in this court within

43	163
43	535

the time required by law, or any extension by the trial court; and (2) the notice of appeal was not served upon the district attorney. This motion was argued and submitted on the first day of the term, but, reserving its decision thereon, the court subsequently heard the case upon its merits. In the view we take of the matter, a decision upon the first ground assigned in the motion will dispose of the case.

1. By order of the trial court, made and entered November 5, 1902, the time within which defendant was required to file the transcript of the cause in this court was enlarged to the 3d of the following month. It was received on that date by the deputy clerk at Pendleton, and a notation made in the docket of its receipt; but the filing fee of \$15, which should accompany it, remaining unpaid until December 16th, it was not filed until the latter date. It may be noted, however, that upon receipt of the transcript the deputy clerk, by mistake, notified the attorney for respondent of the failure to forward the filing fee, but, upon being informed of his mistake, notified appellant's attorney, who at once forwarded it. The appellant insists that, notwithstanding this state of the case, there has been a proper filing of the transcript within the prescribed time, and that she is therefore entitled to a decision upon the merits. The statute provides, in effect, that, upon an appeal being perfected, the appellant shall, within thirty days, or within such extension of time as the trial court, or judge thereof, or the supreme court, or a justice thereof, may allow, file with the clerk of the supreme court a transcript, or such an abstract as the rules of the appellate court may require, and that upon the filing thereof he shall pay to such clerk the sum of \$15, which, with all other fees collected by virtue of his office, shall be paid to the state treasurer: B. & C. Comp. §§ 553, 887. The general rule operating under ordinary statutes regarding the filing of a paper or docu-

ment is that it is filed when delivered to the proper officer, and by him received to be kept on file: Bouvier's Law Dict. (Rawle's Rev.); 13 Am. & Eng. Ency. Law (2 ed.), 15; *McDonald v. Crusen*, 2 Or. 258; *Moore v. Willamette T. & L. Co.* 7 Or. 359; *Powers v. State*, 87 Ind. 144; *Peterson v. Taylor*, 15 Ga. 483 (60 Am. Dec. 705); *Floyd v. Chess-Carley Co.* 76 Ga. 752; *Gorham v. Summers*, 25 Minn. 81; *Reed v. Acton*, 120 Mass. 130; *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501.

But a filing may depend upon the terms of the statute authorizing it, and will not become operative until the requisites are first complied with, at least in substance; and, if a fee is made a necessary prerequisite thereto, no filing is accomplished or effected without the payment of such fee. To illustrate: Under an Indiana statute the Secretary of State was required to exact certain fees for filing and recording an agreement of railroad companies to consolidate, which provided that he should neither file nor record any of such articles unless all the fees for filing were first paid; and it was held, in *State v. Chicago & E. I. Ry. Co.* 145 Ind. 229 (43 N. E. 226), that the payment of such fees was a condition precedent to the filing—in other words, that the filing could not be effected without the prior payment of the requisite fees—the court saying: “The rule may be asserted that where the statute provides that the filing fee shall be paid in advance of the filing of the document, and where the money therefor does not, under the law, go to the officer with whom the same is required to be filed, as his own remuneration, but goes into the public treasury for the benefit of the state, as it does in accordance with the requirements of the statute in question, the officer must be considered (at least in discharge of the duty enjoined upon him to collect the fee in advance for the services rendered by the state through him) as the agent of the latter; and, as such, he

is not authorized to file the papers or articles presented and required to be filed, although they may be left at his office or in his custody for such purpose, until the fee is first paid; and, in consideration of law, they cannot be held or deemed to be filed until there is a compliance with this requisite condition. Under such circumstances the law is the letter of the officer's agency, and he has no warrant to waive the advance payment of the fee." A rule of similar import is promulgated in *Pinders v. Yager*, 29 Iowa, 468, and we are of the opinion that it should be applied under the circumstances in the case at bar. Upon filing the transcript the appellant is required to pay to the clerk, in advance, the sum of \$15. Nothing could be plainer than a legislative intendment that the fee, ultimately to be paid over to the State Treasurer, should be prepaid as a prerequisite to the filing; and, without such an observance of the statute, there could be no filing. The purpose, no doubt, was to facilitate the collection of the public revenue derivable from this source, and the filing was therefore made dependent upon its prepayment. In the present instance the transcript was not received by the clerk to be kept on file, as he refused to so treat it, or to make a notation of filing thereon, until the fee was paid, thus rightly interpreting the statute; and, the fee not having been paid in advance, there was no filing, within the purview of the law, within the prescribed limit for filing such transcript; hence the motion should be allowed, and the appeal dismissed. However desirous it may be to have causes disposed of on their merits, the court cannot evade or override a positive statute to enable it to do so. Indeed, it can acquire no jurisdiction for that purpose in the face of such statute.

2. It is suggested that the motion should have been to affirm the judgment rendered (B. & C. Comp. § 553), and not to dismiss; but the latter is employed in constant practice, and is adequate for the purpose of presenting the

question whether or not the appeal has been perfected so as to give the appellate court jurisdiction of the cause.

DISMISSED.

Decided 29 June, 1903.

STATE v. HOWARD.

[72 Pac. 880.]

WITNESSES—IMPEACHMENT—EXPLANATORY EVIDENCE.

Where an affidavit concerning the falsity of his testimony in another trial is produced on his cross-examination to impeach a witness, he may relate a conversation with a third person, who importuned him to make the affidavit, and state the contents of a threatening note which he had previously received, and which was referred to in the conversation, to explain the circumstances under which the impeaching affidavit was made.

From Baker: ROBERT EAKIN, Judge.

Manny Howard, jointly informed against with Alexander Meldrum, was convicted of larceny, and appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Geo. J. Bentley*.

For the state there was a brief over the name of *Samuel White*, District Attorney, with an oral argument by *Mr. Andrew M. Crawford*, Attorney-General.

MR. JUSTICE BEAN delivered the opinion.

This is the second appeal in this case. Defendant Howard and one Meldrum were jointly charged by an information filed by the district attorney with the crime of larceny, by stealing an animal belonging to R. R. Palmer and H. E. Denham. Howard was tried first, and convicted, but upon appeal the judgment was reversed, and a new trial ordered: *State v. Howard*, 41 Or. 49 (69 Pac. 50). Meldrum was thereafter tried, convicted, and the judgment affirmed: *State v. Meldrum*, 41 Or. 380 (70 Pac. 526). Howard was retried, convicted, and again appeals.

The questions arising on the instructions, and relating to the sufficiency of the evidence to justify a conviction,

are practically the same as in the Meldrum Case. We have reëxamined them, and find no reason to change the conclusions therein reached.

J. J. Baisley was a witness for the prosecution. He testified that he was employed by Howard and Meldrum to assist in gathering horses from the range; that he was present when the mare in question was driven to the Deal corral, and saw her brand changed by Howard and Meldrum. He was a witness on the first trial of Howard, and testified to substantially the same state of facts. He thereafter made an affidavit to the effect that such testimony was false, and that he was induced to give it by a consideration paid him by one of the prosecuting witnesses. During his cross-examination in the present case this affidavit was produced by the defense, and offered and admitted in evidence, for the purpose of impeaching the witness. He was thereafter permitted, on direct examination, over the objection of the defendant, to relate a conversation he had with one Inman, in which Inman importuned and endeavored to persuade him to make the affidavit, and also to state the contents of a threatening note which he had previously received, and to which Inman referred in such conversation. The contention is that this conversation with Inman was hearsay and inadmissible, because not had in the presence of the defendant, and that the note was incompetent evidence, because it was not shown to have been written or authorized by the defendant. The testimony was admitted, however, for the purpose of explaining the circumstances under which the impeaching affidavit was made, and was expressly limited by the court in its instructions to such purpose. In this view, we think it was competent, and there was no error in its admission.

AFFIRMED.

Decided 27 July, rehearing denied 5 October, 1908.

STATE v. NEILON.

[73 Pac. 821.]

SHERIFFS—EMBEZZLEMENT OF TAXES—ROLLS AS EVIDENCE—ESTOPPEL.

1. In a prosecution against a public tax collector for embezzling taxes the rolls delivered to him by the proper officials are competent evidence to show the amounts collected, though such rolls may not have been properly certified, or have had attached the statutory warrants, for the officer is estopped by his own conduct to deny that the rolls were enforceable.

ACTS OF DEPUTIES—PRESUMPTION AS TO DISPOSAL OF TAXES.

2. Where it appears that deputy tax collectors placed their collections with the other funds of the office, it will be presumed, even in a criminal case for embezzlement, that such funds came into the hands of the principal, and in a settlement of his accounts he should be charged with such sums.

PRESUMPTION AS TO MONEY PAID FOR TAXES BY CHECK.

3. Under a statute* requiring taxes to be paid in current gold and silver coin of the United States, and requiring tax collectors to give receipts for taxes so paid "as cash",† it will be presumed, in the absence of a contrary showing, that the tax collector cashed drafts, checks, or money orders which he received for taxes in lieu of coin, and hence such drafts, etc., are properly chargeable to him in a prosecution for embezzling moneys collected for taxes.

COMPETENCY OF EVIDENCE OF EMBEZZLEMENT OF TAXES.

4. Under Hill's Ann. Laws, § 2797, requiring the sheriff to settle with the county treasurer once in every thirty days, and to pay over to that officer all moneys received for taxes, and the treasurer to give the sheriff duplicate receipts for the money paid over, one of which is required to be filed with the county clerk, in a prosecution against a sheriff for embezzling taxes collected, the sheriff's statements on which he had made settlements with the county treasurer, the treasurer's books, and the duplicate receipts so filed, are competent evidence of the amount accounted for by the sheriff, and are *prima facie* sufficient for that purpose.

EMBEZZLEMENT OF LAWFUL MONEY—NECESSARY PROOF.

5. Under an information charging embezzlement of lawful money of the United States, it must be proved that the money stolen was of the kind named.

*NOTE.—The statute here referred to is Section 2798, Hill's Ann. Laws, which is the same in the editions of 1887 and 1892. In 1901 the section was radically amended, but this decision is made under the reading before the amendment, which was as follows, so far as here involved: "All state, county, school and millitary taxes shall be paid in current gold and silver coin of the United States, except that county orders shall be received for county taxes in the county where issued, if offered before the time for returning the warrant," etc.

†NOTE.—The statute here considered is Section 2801, Hill's Ann. Laws, which is the same in both editions of that compilation, and, so far as here involved, reads as follows: "It shall be the duty of each and every sheriff in the several counties of this state, acting as tax collectors, upon the receipt of money for taxes, to give a receipt therefor, showing the amount paid in coin or currency as cash, and the amount paid in county orders; and the sheriff shall note separately upon each stub, as in the receipt, the amount of cash and county orders respectively received," etc.

REPORTER.

EMBEZZLEMENT OF LAWFUL MONEY—SUFFICIENCY OF PROOF.

6. Where a sheriff was authorized to receive in payment of taxes only current gold and silver coin of the United States and certain county orders, and in a prosecution against him for embezzlement of money so received it was proved that he collected as taxes while in office, and paid over to the county treasurer, certain sums, leaving a balance unaccounted for, and that he and his deputies received for taxes gold, silver, and treasury notes, national bank notes, silver certificates, checks, money orders, and county warrants, the evidence sufficiently supported an allegation in the indictment that the money converted by defendant was "lawful money of the United States," though the particular coins converted were not identified, for, in such cases, it is not necessary to show the character of the money converted, since presumably public officers receive only lawful money.

STATUTES RELATING TO EMBEZZLEMENT—CONSTRUCTION.

7. Section 1772, Hill's Ann. Laws, is a general statute for the punishment of persons who may receive public money and fail to account therefor, while section 1895 relates only to tax collectors who fail to perform certain stated duties; hence a sheriff who has been convicted of converting to his own use money received by him for taxes is punishable under section 1772.

From Klamath: HENRY L. BENSON, Judge.

A. J. Neilon, having been convicted of larceny of public money, appeals from the judgment. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Austin S. Hammond* and *Mr. Chas. A. Cogswell*, with an oral argument by *Mr. R. S. Taylor*.

For the state there was a brief and an oral argument by *Mr. Andrew M. Crawford*, Attorney-General, and *Mr. A. E. Reames*, District Attorney.

MR. JUSTICE BEAN delivered the opinion.

The defendant was sheriff of Lake County from July 5, 1898, to July 2, 1900, and Lane, Beall, and Houston were his deputies. During his term of office he and his deputies collected a large sum of money as taxes on the tax rolls for the years 1893 and 1899, inclusive, a portion of which it is averred he did not pay over to the county as required by law, but unlawfully and feloniously converted to his own use. He was arrested and charged, under Section 1772,* Hill's Ann. Laws, 1892, with the crime of larceny of public money; it being averred in the informa-

*Now Section 1807 of B. & C. Comp.

tion that on July 1, 1900, he did feloniously take, steal, and make away with and convert to his own use \$6,461, lawful money of the United States and the property of Lake County, which he had received as tax collector, and which he feloniously and wrongfully neglected and refused to pay over to the county as by law required. He was tried and convicted as charged, the jury finding the amount of money which he failed to pay over to be \$3,000. From the judgment entered on the verdict he appeals.

It is insisted that the court erred in admitting in evidence the tax rolls for the years 1893 to 1898, inclusive; proof that the defendant and his deputies collected money thereon as taxes; and the testimony of the experts as to the amount shown by the tax rolls, stubs, and reports of the defendant to the county treasurer, to have been collected by him as taxes.

1. The objection to the admission in evidence of the assessment rolls, and their use as testimony in determining the amount of money collected by the defendant, is that they were not properly certified to, and did not have annexed thereto legal warrants authorizing the defendant to collect taxes thereon. The evidence tended to show that these rolls were in the usual form, and came into the hands of the defendant as sheriff and tax collector of the county, and that as such officer he received and collected taxes thereon, giving proper receipts to the taxpayers. It is therefore, in our opinion, no defense to this prosecution for converting the money so collected to his own use that the rolls were not properly certified to, or did not have legal warrants attached authorizing the seizure and sale by the defendant of the property of the taxpayer to satisfy the tax; for, as said by the Supreme Court of Missouri in disposing of a similar question in a like prosecution, "it can make no difference in this proceeding whether the tax books were properly certified or not. The defendant re-

ceived and receipted for them, and the moneys collected in payment of taxes extended thereon were public moneys. They were none the less public moneys because the tax books may not have been duly certified": *State v. Findley*, 101 Mo. 217, 224 (8 Am. Crim. Rep. 194, 14 S. W. 185, 187). It has accordingly been held that a tax collector is an agent of the state, and, where he collects money as taxes, he will not be heard to urge, in defense to a suit for its recovery, that the money he received was on account of taxes which the legislature had no constitutional power to impose (*Waters v. State*, 1 Gill, 302); nor to question the regularity of the proceedings whereby the funds came into his possession (*Mason v. Fractional School Dist.* 34 Mich. 228); or the right of the county to receive them (*Village of Olean v. King*, 116 N. Y. 355, 22 N. E. 559); or that he was not legally chosen, or the assessment was defective and irregular: *Ford v. Clough*, 8 Me. 334 (23 Am. Dec. 513).

A public officer charged with the duty of collecting taxes is not permitted to deny his own power or right to make the collection after having exercised it. He will not be allowed to assert that a tax is chargeable against the taxpayer when he demands or receives it, and then say that it was not legally so when the state demands it from him, or when he is prosecuted criminally for its embezzlement. He must pay over the money so received as provided by law, and let the aggrieved party make his application to the proper authorities for reimbursement. He cannot assert that he retains the money as the representative of the taxpayer. There is no relation of principal or agent, or trustee and *cestui que trust*, existing between him and the parties from whom he received the money. They paid it in satisfaction of the taxes appearing against them on the tax rolls of the county, and the officer must be held accountable for it as such. There was, therefore, no error

in admitting the tax rolls in evidence, and using them as a basis for determining the amount collected by the defendant as taxes, even though the proceedings in the levy of the tax, or in the matter of the assessment rolls and returns thereon were so irregular and imperfect as to have been no justification to the sheriff if he had attempted to enforce the collection by legal process.

2. It is argued that the sums received by the deputies, Lane, Houston, and Beall, should not have been included in the amount alleged to have been collected by the defendant as taxes; but there was no error in this regard. These men were the duly appointed and acting deputies of the defendant, and collected the money in question as such. There was no contention, as we understand it, that they embezzled or converted any of it to their own use. Lane put what he collected in the sheriff's cash box in the county safe, from which payments were made from time to time to the county treasurer. The money collected by Houston was paid over to the county treasurer to the credit of the defendant. That collected by Beall was placed in the money drawer in the defendant's office. It is true the bill of exceptions recites that there was no evidence that any of the money collected by Lane or Beall ever came into the possession of the defendant, or that he knew that Beall ever made any such collections. But these men were his deputies, and he knew they were discharging the duties of such office. The money collected by them was mixed and mingled with the money of the office, and as such presumably came into his possession and under his control; at least, the jury were justified in so finding from the manner in which the business was conducted.

3. Again, it is contended that it was error to include in the amount with which the defendant should be charged \$2,278.80, school taxes collected by him, and \$7,561.21, paid to him in checks, money orders, and drafts. The en-

tire deficit, as the evidence tended to show, was something over \$6,000, while the jury found that the amount which the defendant failed to pay over was only \$3,000; so that the school tax was probably deducted by the jury, and may be eliminated from the discussion, although it is doubtful whether it would not be deemed the money of the county for the purposes of this prosecution: *State v. Hays*, 78 Mo. 600. The checks, drafts, and money orders were, as the bill of exceptions recites, received by the defendant and his deputies "for taxes" and "in collecting taxes," but there was no evidence to show what was done with them, except that Lane testified that those taken by him were cashed, and the money paid into the county treasury. The law in force during defendant's incumbency of the office of sheriff required that all taxes should be paid in "current gold and silver coin of the United States," except that county orders might be received under certain conditions and limitations (Hill's Ann. Laws, 1892, § 2798), and that the sheriff should give to the taxpayer a receipt, showing the amount paid "as cash," and note the same upon the stub or duplicate of such receipt retained in his office (Hill's Ann. Laws, § 2801). It was therefore the duty of the defendant to receive as taxes only gold and silver coin of the United States and county warrants. If, for the accommodation of the taxpayer, he chose to take drafts, checks, or money orders, they were received in lieu of coin, and when they were cashed by the defendant the money became the property of the county, and he was bound to pay over and account for it the same as any other money received by him: *Adams v. People*, 25 Colo. 532 (55 Pac. 806). It is true the bill of exceptions recites that there was no evidence as to what was done by defendant with the checks and drafts; but, in the absence of a showing to the contrary, the jury were justified in finding that they were by the defendant converted into money, on the presumption

that the usual course of business was pursued: B. & C. Comp. § 788, subd. 20. It is common knowledge that a great proportion of the taxes of the country are paid in checks, drafts, and money orders, and that such paper is converted by the officer into money. It is but fair to presume that such was the course of procedure by the defendant.

4. It is argued that there was no evidence that the defendant did not pay over to the county treasurer all the money received by him. The law required the defendant, as sheriff, to settle with the county treasurer once in every thirty days, and to pay to that officer all money received on taxes from any tax list in his hands for collection, the treasurer being required to give him duplicate receipts for the money so paid over, one of which he was to file with the county clerk: Hill's Ann. Laws, 1892, § 2797. The statements of the defendant upon which he made his various settlements with the county treasurer, the books of that officer, and the duplicate receipts filed in the office of the county clerk, were all introduced in evidence, and were sufficient to show, *prima facie* at least, the amount of money paid over and accounted for by him. The presumption is that official duty was regularly performed, that the treasurer's books were correctly kept, that he gave receipts to the defendant for all taxes paid to him, and that such receipts were filed in the clerk's office: *City of Portland v. Besser*, 10 Or. 242. The manner in which the business seems in fact to have been transacted was sufficient, no doubt, to weaken this presumption and to impair the value of the evidence; but it did not destroy its competency. The weight to be given to the testimony was a matter for the jury.

5. The information charges that the money which it is alleged the defendant converted to his own use and failed to pay over was lawful money of the United States, and it

is argued that, while it was not necessary for the state to have alleged that fact, it must be proven as alleged. It has been held that, under an indictment charging larceny of lawful money of the United States, it is incumbent upon the prosecution to prove that the money stolen was of the kind and character described in the indictment: *Hamilton v. State*, 60 Ind. 193 (28 Am. Rep. 653); *Vale v. People*, 161 Ill. 309 (43 N. E. 1091); *Gerard v. State*, 10 Tex. App. 690. Within this rule the defendant should have been acquitted unless the evidence tended to show, either directly or by inference, that the money embezzled by him was lawful money of the United States.

6. Now, the bill of exceptions contains a statement that "there was no evidence tending to show that any money which the defendant may have failed to pay over to the county treasurer, which he or his deputies collected on account of taxes, was lawful money of the United States." If this statement stood alone, we would probably be compelled to reverse the judgment; but it must be interpreted in the light of the entire bill of exceptions, and when so read it means nothing more, it seems to us, than that there was no testimony tending to show that the particular coin or coins which the defendant failed to pay over were lawful money of the United States. But that character of proof is not necessary in a prosecution of this kind: *State v. Carrick*, 16 Nev. 120, 124; *State v. Smith*, 13 Kan. 274, 295. In a prosecution against a public officer for embezzlement, it is sufficient to prove the felonious conversion by him to his own use of any money that came into his possession or was under his control by virtue of his office, without identifying the particular kind and character of money. If the law required the kind and character of money embezzled and the particular date of embezzlement to be proved, it would practically be an effectual bar to any prosecution of such an officer for the wrongful and unlawful conver-

sion to his own use of public funds. The officer is the only person who knows the kind and character of money in his custody or under his control. The public at large can exercise no supervision over his acts, nor can it, like an individual, assume direct custody of the funds. It is therefore sufficient to show that he received money belonging to the state or county by virtue of his office, which he wrongfully and unlawfully converted to his own use; and, where he is presumed to receive only lawful money of the United States, it will be presumed that the money embezzled was of that character until the contrary is shown.

It clearly appears from the bill of exceptions that there was competent evidence tending to show that the defendant collected as taxes from the various taxpayers of the county, during the time he was in office, the sum of \$94,758.19, and that he only paid over to the county treasurer \$88,125.67, leaving a balance unaccounted for of \$6,632.52; that "for taxes he and his deputies received gold, silver, and treasury notes, national bank notes, silver certificates, checks, money orders, and county warrants." All these several items were received by the defendant in payment of taxes, as the agent or representative of the county, and if the checks, drafts, and money orders, etc., were by him converted into money (and that was a question for the jury), it was the money of the county, which, if he converted to his own use, could properly be described in an indictment or information as lawful money of the United States. We think, therefore, that the bill of exceptions, as a whole, does show that there was evidence from which the jury could properly find that the money converted by the defendant was lawful money of the United States, although there may have been no evidence tending to identify the particular coin or coins so converted. This was evidently the view of the trial judge, otherwise, he would have directed a verdict of acquittal.

He was particular to charge the jury that they could not find the defendant guilty unless they believed that the money was lawful money of the United States, and that the only money coming within that term is "coins of the United States and United States treasury notes, commonly called 'greenbacks';" that checks, drafts, money orders, and bank notes are not lawful money of the United States; and that they could not find the defendant guilty unless they believed that he converted or failed to account for United States coins or treasury notes, commonly called "greenbacks."

7. It is contended that because the jury did not find that the defendant converted the money to his own use, but only found that he failed to pay it over, the crime of which he was guilty is that defined by Section 1995,* and not Section 1772,† Hill's Ann. Laws, 1892, and that he should have been sentenced accordingly. It may be conceded that, where criminal statutes provide different penalties for the same offense, the later one will govern and control if the penalty therein provided is less than that in the earlier statute: *Commonwealth v. Kimball*, 21 Pick. 373; *Commonwealth v. Davis*, 11 Gray, 48; *Huber v. State*, 25 Ind. 175; *Hayes v. State*, 55 Ind. 99. But the two statutes in question do not relate to the same matter nor provide for the punishment of the same offense. Section 1772 is a general statute, providing for the punishment of any person who shall receive any money whatever for the state or county, and convert the same to his own use, or shall feloniously neglect or refuse to pay it over as by law directed and required. Section 1995 is section 19 of the act of October 21, 1864 (Deady's Gen. Laws, p. 908, § 49), providing for the collection of taxes, and is confined

*This is B. & C. Comp. § 8115.

†This is B. & C. Comp. § 1807.

to the specific offenses therein enumerated. By section 4 of that act it is made the duty of the sheriff to pay over to the county treasurer, at least once a month, all money collected by him as taxes, and, by sections 15 and 16, to make out and return to the county clerk, by a certain date, a statement of delinquent taxes. Section 19 provides for his punishment in case he fails to do either. It is not a general statute, designed to apply to an officer who feloniously fails or neglects to account for or pay over to the proper authorities money received by him belonging to the state, but is only for the punishment of a sheriff who fails to make monthly settlements with the county treasurer, or neglects to make out the delinquent list, as required by the act: *State v. Dale*, 8 Or. 229. Finding no error in the record, the judgment of the court below is affirmed.

AFFIRMED.

Decided 8 June, 1903.

STEIGER v. FRONHOFFER.

[72 Pac. 603.]

MOTION TO DISMISS OR AFFIRM—RULES OF COURT.

1. A motion to dismiss an appeal, or to affirm the judgment because of failure to file briefs, as required by Rule 14, need not be considered where an examination of the record shows that the judgment should be affirmed on the merits.

INSTRUCTIONS ON IRRELEVANT ISSUES NOT PROPER.

2. Abstract propositions of law should not be stated to a jury under the guise of instructions, but the propositions should be applied to the facts in hand; thus, in an action for the price of sundry chattels, where a rescission was not pleaded, the court properly refused to give requested instructions stating merely the law on the right of rescission.

RESCISSION OF CONTRACT—CONSTRUCTION OF PLEADING.

3. Where an action was brought for the price of sundry sheep, an answer that the animals were bought for mutton, as the plaintiff well knew, that they were diseased and unfit for eating, that when defendant discovered their condition, some time after delivery, "he notified plaintiff that he could not use them, and that he held them subject to plaintiff's orders," is not a plea of rescission and return, for it does not state that defendant disaffirmed the contract, nor that he returned or offered to return the property, nor does it show any reason for not doing so.

SALES—DAMAGES FOR BREACH.

4. In cases of sales where the articles delivered are not of the kind or quality required by the contract, but the buyer elects to retain the property rather than rescind the sale, he is liable for the purchase price less such damages as he may

43	178
44	574
43	178
48	305

have sustained by the breach of the contract: for instance, where a seller of sheep delivered diseased animals, which the buyer retained without rescinding or offering to rescind, the buyer was entitled, in an action for the price of the sheep, to set off expense which he had been compelled to incur in caring for the sheep because of their diseased condition.

From Baker: ROBERT EAKIN, Judge.

This is an action by John Steiger against Geo. Fronhofer to recover a balance alleged to be due the plaintiff on a contract for the sale and delivery of sheep. It is alleged in the complaint that on or about the twentieth of September, 1901, the plaintiff sold and delivered to the defendant 177 ewe sheep, at the agreed price of \$2.50 per head, and 20 lambs, at the agreed price of \$2 per head, amounting in the aggregate to the sum of \$482.50; that no part thereof has been paid, except the sum of \$82.50; that the balance is due and payable. The answer denies the contract as alleged in the complaint, except as thereafter set out, and for an affirmative defense avers, in substance, that on or about the twentieth day of September, 1901, the plaintiff and defendant entered into a contract whereby the defendant agreed to purchase of the plaintiff the number of sheep and at the price alleged in the complaint; that plaintiff agreed to deliver the same when requested, and in such numbers as the defendant might elect; that the defendant at the time was engaged in the butchering business at Baker City, and the sheep he bought were intended for such purpose—a fact well known to the plaintiff; that, notwithstanding the agreement, plaintiff delivered sheep to him in a diseased and unhealthy condition, all of which, with the exception of 41 ewes and 6 lambs, were wholly unfit for use in his business; that he did not discover their condition until some time after their receipt, and that immediately upon such discovery he notified the plaintiff that he could not use them, and that he held them subject to plaintiff's order; that by reason of the diseased condition of the sheep, and

because they were wholly unfit for the purpose for which they were purchased, he was obliged to, and did, care for them, and pay out therefor the sum of \$761.20, for which he asks judgment against the plaintiff. The reply denies all the material allegations of the answer.

The evidence tends to show that the defendant went to the corral of the plaintiff, and inspected a band of about 2,000 head of sheep therein, for the purpose of buying some for butchering; that after making the examination he agreed to take 177 ewes, at \$2.50 a head, and 20 lambs, at \$2 a head; that he did not have time on the day of his examination to make the selection himself, but agreed to leave that to the plaintiff, and directed him to put the sheep, after they had been segregated from the band, in a pasture near by, belonging to one Worley, engaging to take care of them himself thereafter. On the next morning the plaintiff, as he testifies, separated the requisite number of sound, prime mutton sheep from the band, and put them in Worley's pasture for the defendant, as directed. A few days later he called upon the defendant for his pay, and received \$82.50 thereon. About October 19, 1901, Worley took 20 head of sheep to Baker City, where they were delivered to and butchered by the defendant, and on the 27th or 28th of the same month 22 more were taken and used by him. The rest of the sheep remained in the pasture until about the twentieth of November, when Worley drove them down to Baker City; but at that time they were diseased and unfit for mutton, which was the first that defendant knew of their unsuitable condition. The defendant testifies that a few days later he notified the plaintiff "that the sheep was in very poor condition and diseased, and had the scab, and I could not use them, and I did not like to make any trouble for him. He should let me know what he wanted to do. I asked him to say what he wanted to do." Receiving no answer to this letter, he again wrote

to the plaintiff on the eleventh of December, saying: "As I wrote you before the sheep were affected and I had to pay Willett (Worley) for dipping them; then they broke out again and I had to have them dipped again. I had the stock inspector look at them again, and I guess they are about all right now. I have done all I could to protect you, so if you will do the right, all right; if not, you can take the sheep back and be involved in a lawsuit." The defendant also gave evidence tending to show the cost and expense he had incurred in taking care of the sheep.

At the conclusion of the evidence he requested the court to charge the jury that if they found the contract was for the purchase of mutton sheep, and plaintiff had delivered sheep that were not suitable for that purpose, but were diseased, and on account thereof defendant was compelled to, and did, lay out and expend sums of money for their care, the verdict should be for him in such sum as he was compelled to expend in the care of the sheep. This instruction was refused, and the court charged the jury that, if the sheep were purchased from the plaintiff by the defendant for mutton sheep, the law implies a warranty by the plaintiff that they were sound and free from disease, and fit for that purpose, and that, if they were diseased at the time of delivery, the defendant is entitled to offset against the purchase price any damages that resulted to him in consequence of their diseased condition; that, if they were of the kind and quality called for by the contract, the plaintiff would be entitled to recover the balance due on the purchase price thereof, with interest thereon at 6 per cent per annum, but, if the defendant was entitled to damages on account of a breach of the contract, the jury should ascertain the amount thereof, which would include the total loss of the sheep, as well as defendant's outlay or other damages on account of their diseased condition, and, if such damages exceed the unpaid part of the purchase

price, then he would be entitled to a verdict for the balance. The verdict of the jury was in favor of the plaintiff, as prayed for in the complaint, and from the judgment entered thereon the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Smith & Heilner*.

For respondent there was a brief over the name of *Chas. A. Johns*.

MR. JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion.

1. The plaintiff moves to dismiss the appeal on the ground that the appellant's brief was not filed within the time required by the rules of this court. Rule 14 (35 Or. 600) provides that if the appellant shall, without reasonable excuse, fail or neglect to serve and file a brief as required, the respondent may have the judgment or decree affirmed, on motion and notice, but there is no provision by which he may have the appeal dismissed because of a failure to comply with the rules. The plaintiff's motion, therefore, is not technically within the terms of the rules, and it may be doubted whether the court would be justified in treating it as a motion to affirm rather than to dismiss. However that may be, the briefs have been filed upon both sides, and, upon examination of the record, we are of opinion that the judgment should be affirmed, which renders the further consideration of the motion unnecessary.

2. The error complained of by the defendant is that the trial court did not instruct the jury that, if the sheep delivered were not of the kind and quality called for by the contract, the defendant had a right, within a reasonable time after the discovery of their inferior or diseased condition, to return them and rescind the contract, and, if he did so, he would not be liable for the balance due on

the purchase price thereof. As an abstract proposition of law this may be conceded; but it has no application to this case, because rescission is not pleaded as a defense, nor was the court requested to instruct the jury upon that phase of the case.

3. The answer admits that the sheep were delivered by the plaintiff and received by the defendant, and there is no allegation of an offer to return them. The answer alleges that, notwithstanding the agreement, the plaintiff delivered to the defendant diseased and unhealthy animals, and the defendant did not discover their condition until some time after their receipt; that, immediately upon such discovery, "he notified plaintiff that he could not use them, and that he held them subject to plaintiff's order." But this is not an averment that he returned the sheep, or offered to return them, or that he rescinded or desired to rescind the contract of sale. A plea of rescission and return should show that the defendant disaffirmed the contract, and returned or offered to return the property, or should set up some excuse for not doing so: 19 Ency. Pl. & Pr. 47. The entire answer, as we construe it, is consistent with the intention of the defendant to retain possession of the sheep, and to recoup in damages for their alleged inferior or diseased condition.

4. The only instruction requested that has any bearing upon the question of rescission was that, if the defendant was compelled to lay out and expend money for the care of the sheep on account of their diseased condition, the verdict should be in his favor in such amount as he was compelled so to expend. But this is not law. If the sheep were not of the kind and quality called for by the contract, the defendant had a right to refuse to accept them, or, after delivery, if within a reasonable time, he could have returned them, and thereby rescinded the contract: *Sun Pub. Co. v. Minnesota Type Foundry Co.* 22 Or. 49 (29

Pac. 6); *Brigham v. Hibbard*, 28 Or. 386 (43 Pac. 383). But if he retained possession of the sheep, without rescinding or offering to rescind, the plaintiff was entitled to recover the contract price, less any damages defendant may have sustained by reason of a breach of the contract by the plaintiff, and the plaintiff's recovery could not be defeated simply because the sheep were diseased, or because the defendant was obliged to incur some expense in their care. The court instructed the jury that if the sheep were in fact diseased, and did not fulfill the terms of the contract, the defendant had a right to set off against the purchase price the amount he was compelled to expend in the care of the sheep on account of their diseased condition; and this, it seems to us, was all he could ask, under the pleadings and the evidence: *Bump v. Cooper*, 19 Or. 81 (23 Pac. 806.).

AFFIRMED.

Argued 8 July, decided 3 August, 1903.

STATE v. GIBSON.

[73 Pac. 333.]

PRESUMPTION OF INTENT TO MURDER—BURDEN OF PROOF.

1. The statute declaring that an intent to murder is conclusively presumed from the deliberate use of a deadly weapon causing death within a year is applicable only to cases where no circumstances of mitigation, justification, or excuse appear in evidence; while, where such circumstances do appear, the presumption is a rebuttable one, and the question of the intent to murder is for the jury, to be determined from a consideration of all the circumstances shown in evidence, the burden of proof remaining with the state throughout the proceeding.

RIGHT OF SELF-DEFENSE—NECESSITY OF RETREATING.

2. The right of self-defense being founded on necessity, the party who would invoke it must avoid the attack, if he can do so without danger to himself; but where an assault is precipitated without provocation, and is such as to indicate to a reasonable mind acting on appearances that the danger to life or the infliction of great bodily harm is imminent, the party assailed is justified in killing the aggressor, if necessary, and need not retreat or resort to expedients less violent.

From Josephine: HIERO K. HANNA, Judge.

Thos. J. Gibson appeals from a conviction of murder.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Robert Glenn Smith* and *Mr. L. Bilyeu*.

43	184
43	383
43	456
43	184
46	32

For the state there was a brief and an oral argument by *Mr. Andrew M. Crawford*, Attorney-General, and *Mr. A. Evan Reames*, District Attorney.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendant appeals from the judgment of the circuit court, rendered upon his conviction of the crime of murder in the first degree, alleged to have been committed by shooting one B. Schonbacheler with a gun. The killing was admitted, and self-defense interposed as a justification. Defendant and Schonbacheler lived upon adjoining places, their dwellings being situated about one hundred and seventy-five yards apart. It was shown by defendant's testimony and admissions that in the evening of the eighteenth of April, 1902, he took his gun, and went from his house toward a crossing on Rogue River, intending to ask one Van Dorn, who lived on the other side, for the use of his boat to go down the river in order to procure his own; that his course led him diagonally across his own premises, approaching the division line between his and Schonbacheler's, the crossing, however, being upon his own land, and that by taking this direction it was his purpose to avoid going upon or across the premises of the deceased, who had threatened his life; that he saw deceased come out of his house with a gun, and proceed down upon his side of the line fence in a southeast direction, their courses converging to a common point; that deceased was continuously in view of him, except for a short time, when he disappeared behind a little raise or knoll; that, after reappearing, he passed out in front of him, being near the line, and within one hundred yards of him, or about that, when he (defendant) called upon him to drop his gun; that thereupon the deceased, without saying anything, whirled around, threw his gun to his shoulder, and began taking aim at him, when defendant threw up his gun,

took sight and fired, and that the deceased fell; that the defendant then started back to his house, and, after going a few steps, looked around, saw deceased moving, and heard him making a noise, when he fired again. The first shot took effect in the head, and the second in the body, either of which would have proven fatal. It was further shown that on the day previous Schonbacheler threatened that on the morrow he would blow out the defendant's brains with a shotgun, which threat was communicated to him on the morning of the tragedy. The gun which the deceased had was an old shotgun, and was lightly charged, and the accused knew the character of the weapon. There was some testimony also tending to show that the deceased had a bad reputation as being a dangerous and quarrelsome man. Other testimony was adduced, but the foregoing is sufficient to illustrate fairly the nature of the case and the conditions and circumstances under which the defendant seeks to excuse his act in taking the life of the deceased.

The court after reading the indictment to the jury, and defining the different degrees of murder, instructed them:

"There shall be some other evidence of malice than the mere proof of killing to constitute murder in the first degree; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or by some other proof that the design was formed and matured in cold blood, and not hastily upon the occasion. You will not understand from this that it is necessary either to prove poisoning or lying in wait in this case, but there must be some proof satisfactory to your minds that the act charged was done with deliberation and premeditation, in order to find the defendant guilty of murder in the first degree."

After defining the terms "deliberation," "premeditation," and "malice," the court further instructed the jury:

"Certain presumptions of law are conclusive. Under

our statute the following presumptions of law are declared to be conclusive: (1) The intention to murder from the deliberate use of a deadly weapon, causing death within a year. (2) A malicious and guilty intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another."

Following these, there was an instruction as to the law of self-defense. The defendant having saved exceptions to the ruling of the court in this respect, error is assigned, and the question is presented for our determination whether the instructions were proper in view of the case made upon the evidence.

1. The instructions are practically in the language of the statute; but the statute is not applicable in every case of homicide, at least without appropriate explanation and limitations. The first instruction or statute is itself a limitation upon the second, for it confines the operation of the presumption there designated to murder of a lesser degree than the first, and it has been so construed by this court: *State v. Carver*, 22 Or. 602 (30 Pac. 315); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167). See, also, *Hamby v. State*, 36 Tex. 523. The provision adopted by our statute that an intent to murder is conclusively presumed from the deliberate use of a deadly weapon probably comes from Mr. Greenleaf's treatise on Evidence, wherein it is announced as a rule of law that "a sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon:" 1 Greenl. Ev. (16 ed.) § 18. This text has been severely criticised as a logical *non sequitur*, and is not now regarded as sound: 2 Bishop, Cr. Proc. (2 ed.) § 619; *Clem v. State*, 31 Ind. 480. "That a person intends the ordinary consequences of his voluntary act" (B. & C. Comp. § 788, subd. 3), is, by our statute, made a disputa-

ble presumption, and to deduce from it a conclusive presumption of an intent to murder from the deliberate use of a deadly weapon seems still more incongruous and illogical than Mr. Greenleaf's deduction from his premise. But the legislature has made the presumption conclusive, and therefore indisputable, and it should be given that effect where applicable, unless contrary to natural justice. The doctrine of the celebrated case of *Commonwealth v. York*, 9 Metc. (Mass.) 93, 103 (43 Am. Dec. 373), reaffirmed in *Commonwealth v. Webster*, 5 Cush. 295, 309 (52 Am. Dec. 711), as interpreted by the distinguished jurist Chief Justice SHAW, in *Commonwealth v. Hawkins*, 3 Gray, 463, is that, where the killing is proved to have been committed by the defendant, and nothing more is shown, the presumption of law is that it was malicious, and an act of murder; but that it was inapplicable to that case, where the circumstances attending the homicide were fully shown by the evidence. Mr. Thompson states the doctrine thus: "Where it is shown that a homicide was committed with a deadly weapon, and no circumstances of mitigation, justification, or excuse appear, the law implies malice. The malice thus implied is that malice aforethought which is necessary to sustain an indictment for murder": 2 Thompson, Trials, § 2531. The clearest exposition of the rule we have found is that given by Mr. Justice CAMPBELL, of the Supreme Court of Mississippi, in the following language: "The law presumes the accused to be innocent of the crime charged until the contrary is made to appear; but when it is shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof of such homicide, and the law infers that it was malicious, and therefore murder, because, as a rule, it is unlawful to kill a human being, and is murder, if not something else; and, as special circumstances only will vary the legal view of homicide so as to relieve it from the char-

acter of murder, it is inferred or presumed to be such from the fact of killing unexplained; but, if the attendant circumstances are shown in evidence, whether on the part of the state or the accused, the character of the killing is to be determined by considering them, and it is then not a matter for presumption, which operates in the absence of explanatory evidence, but for determination from the circumstances shown in evidence:" *Hawthorne v. State*, 58 Miss. 778, 787. In further support of this doctrine, see *Underhill*, Cr. Ev. § 320; 2 *Bishop*, Cr. Proc. (2 ed.) § 621; *Smith v. Commonwealth*, 1 Duv. 224; *Chrisman v. State*, 54 Ark. 283 (15 S. W. 889, 26 Am. St. Rep. 44); *State v. Townsend*, 66 Iowa, 741 (24 N. W. 535); *People v. Langton*, 67 Cal. 427 (7 Pac. 843); *Trumble v. Territory*, 3 Wyo. 280 (21 Pac. 1081, 16 L. R. A. 384); *Hornsby v. State*, 94 Ala. 55 (10 South. 522); *Erwin v. State*, 29 Ohio St. 186 (23 Am. Rep. 733).

The presumption of an intent to murder incident to the deliberate use of a deadly weapon is, therefore, according to these authorities, not always conclusive of the fact, and is only so when nothing else appears in evidence either to justify or excuse the act. Usually, modifying facts and circumstances are proved in connection with the killing. It might happen that a presumption of any degree is without place in the inquiry, and a development of the case may give rise to a presumption of law, based upon the killing, and the manner of its accomplishment; such as that the accused intended the ordinary consequences of his voluntary act, or that an unlawful act was done with an unlawful intent, or maliciously. Such a presumption is, from its very nature and place in the inquiry, disputable or rebuttable. To make it conclusive would be to cut off further examination as soon as the conditions suggested were developed, or render any testimony of a contrary character wholly unavailing and nugatory for any purpose.

Such was neither the intent nor purpose of the statute, and it would be a perversion of natural justice so to construe it. It was only intended to apply where the mere fact of killing with a deadly weapon deliberately used is shown, without else to modify or otherwise explain the act. Wherever, therefore, there is evidence of a tendency to rebut the presumption, whether it comes from the prosecution or the defense, it becomes a matter for the jury to consider whether it has been overcome, or is of weightier significance, so as to turn the scales of justice; and they must determine from all the evidence in the case whether the state has established the guilt of the accused beyond a reasonable doubt. A defendant is deemed innocent until he is proven guilty—a disputable presumption of law, made so by the statute (B. & C. Comp. § 788), and the state has the burden of proof unto the end. It never shifts, and the ultimate question for the jury is whether, in view of all the facts shown, the accused has been proven guilty: *Goodall v. State*, 1 Or. 334 (80 Am. Dec. 396); *State v. Huffman*, 16 Or. 15, 24 (16 Pac. 640); *Gilbert v. State*, 90 Ga. 691 (16 S. E. 652); *Stokes v. People*, 53 N. Y. 164 (13 Am. Rep. 492); *State v. Smith*, 77 N. C. 488. The jury, therefore, should not be instructed that an intent to murder is conclusively presumed from the act of killing by the deliberate use of a deadly weapon, unless nothing else appears in the case—no other testimony—to modify or excuse the act. But, when such other testimony does appear, they should be informed that the presumption of malice arising from the act, if it has any place in the case, may be rebutted as any other presumption deducible from the facts in evidence that the law does not make indisputable. So we conclude from these principles and deductions that the instructions complained of were inappropriate as given, and constitute error.

2. It is further insisted that the court's instructions

touching the right of self-defense proceeded upon the theory that it was the duty of the defendant to retreat if he could do so with safety, and thereby avoid the necessity of taking the life of the deceased to prevent injury to himself. It is not altogether clear that such was the theory of the trial court, yet there were some suggestions and expressions susceptible of such an interpretation. During the trial, while counsel were arguing concerning the admissibility of certain testimony as to whether the defendant could have gotten out of the way, the court remarked that "he (meaning defendant) must retreat if he can do so with safety to himself," and in the course of the instructions made use of this language:

"You will be entitled to consider the distance between the parties at the time the fatal shot was fired; the means, if any, which he may have had of retreating; and all of the other circumstances surrounding him, as shown by the evidence introduced in the case."

And, again charged the jury:

"The circumstances justifying the resort to self-defense must be such as to make it unavoidable to act otherwise. Therefore, if you believe from the evidence and beyond a reasonable doubt that the defendant in this case could have avoided a conflict without increasing the danger to himself, then I instruct you that it was his duty to avoid such conflict, and so render a resort to self-defense unnecessary; and, if he failed to do so, he could not invoke the aid of self-defense."

There being some question as to what the court really did intend to give the jury to understand in the premises, we have concluded, for the purpose of avoiding a recurrence thereof upon a new trial, briefly to indicate the rule as now established by the undoubted trend of modern authority. The right of self-defense being founded upon necessity, the party who would invoke it must avoid the attack, if he can do so without danger or peril to himself.

Hence it is that no threat to kill or inflict great bodily injury, or lying in wait, without an overt act indicating a design to carry the purpose into immediate effect, will justify the taking of human life. In such cases the attack may usually be avoided without peril, and it is the duty of the one thus threatened so to act that he will not precipitate the attack, and thus himself bring on the necessity for taking life which he could safely avoid: *State v. Johnson*, 76 Mo. 121; *Barnards v. State*, 88 Tenn. 183 (12 S. W. 431). For a much stronger reason will he not be excused where he himself seeks the affray or provokes the assault, and, when attacked, kills his assailant. The necessity for so doing is thus self-imposed, and the law does not shield or excuse his act. A person who makes a malicious assault upon another may, however, put that other resenting it in the wrong by withdrawing from the conflict, and in good faith retreating to a place of apparent safety, and then, if his antagonist pursues him and renews the encounter by an attack such as to endanger life, he may protect his own by killing his aggressor: *Stoffer v. State*, 15 Ohio St. 47 (86 Am. Dec. 470); *State v. McKinley*, 82 Iowa, 445 (48 N. W. 804). So a case is put by Mr. Justice BRONSON in *Shorter v. People*, 2 N. Y. 193, 203 (51 Am. Dec. 286), where a man is struck with the naked hand, and has no reason to apprehend any danger of great bodily harm, that he must not return the blow with a dangerous weapon, but must quit the conflict if he can do so with safety. This illustrates the text of 1 Bishop, Cr. Law (7 ed.), § 850, where it is said: "These cases of mere assault and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books that one cannot justify the killing of another, though apparently in self-defense, unless he retreated 'to the wall,' or other interposing obstacle, before resorting to this extreme right."

But the doctrine has no place in criminal law where the assault is precipitated without provocation, and is of such a character as to indicate to a reasonable mind acting upon appearances that the danger to life or the infliction of great bodily harm is imminent. In such case the assailed is justifiable in killing his aggressor if necessary to avert the consequences upon himself, and need not consider on the moment whether he may avert the impending danger or avoid the taking of the life of his antagonist by retreating, or resorting to some other expedient less violent. If such a course were required of him, the right of self-defense in many, if not in most, instances would prove unavailable, because in the instant of consideration or effort to avoid the threatened injury the assailant might execute his felonious purposes. So that if a man, being upon his own premises, or in a place where he has a right to be, is assailed without provocation by a person with a deadly weapon, and apparently seeking his life, he is not obliged to retreat, or consider whether he could safely do so, but may stand his ground, and meet the attack in such a way and with such force as, under all the circumstances, he at the moment honestly believes, and has reasonable ground to believe, is necessary to save his own life or protect himself from great bodily harm: *Goodall v. State*, 1 Or. 334 (80 Am. Dec. 396); *Beard v. United States*, 158 U. S. 550 (15 Sup. Ct. 962); *Erwin v. State*, 29 Ohio St. 186 (23 Am. Rep. 733); *Runyan v. State*, 57 Ind. 80 (26 Am. Rep. 52); *Fields v. State*, 134 Ind. 46 (32 N. E. 780); *State v. Cushing*, 14 Wash. 527 (45 Pac. 145, 53 Am. St. Rep. 883); *Baker v. Commonwealth*, 93 Ky. 302 (19 S. W. 975).

Other errors are assigned, but as the questions involved may not arise upon a new trial, we deem it unnecessary to discuss them at this time. The judgment of the trial court will be reversed, and a new trial ordered.

REVERSED.

Decided 8 June, 1903.

OVERHOLT v. DIETZ.

[72 Pac. 695.]

REAL PARTY IN INTEREST—PLEADING.

1. The defense that the plaintiff is not the real party in interest, and therefore not entitled to maintain the proceeding, must be specially pleaded, and such facts stated as to disclose who the real party may be.

PROMISSORY NOTE—MATERIALITY OF DENIAL OF OWNERSHIP.

2. In a suit on a note and mortgage, a denial of their indorsement and assignment to plaintiff and of his ownership thereof, is not sham, frivolous, or irrelevant, since it raises an issue on a material point, viz., the ownership of the documents.

EVIDENTIARY FACTS—CREDIBILITY OF WITNESS.

3. Entries bearing on the ownership of a note, made in the inventory of the executrix of a deceased partner and in that of the administrator of the partnership estate, and omitted from the surviving partner's schedule, drawn when he made an assignment for creditors, are evidentiary circumstances merely, and not conclusive as to the title to the note.

EFFECT OF SETTLING A GENERAL ASSIGNMENT.

4. The effect of settling a general assignment proceeding out of court is to leave the title of the assignor to the assigned property unaffected.

NOTE—ACTION BY BENEFICIAL OWNER—REAL PARTY IN INTEREST.

5. In actions on promissory notes, where the plaintiff is not the payee, or his indorsee or transferee, he is still the real party in interest, within the meaning of B. & C. Comp. § 27, and may maintain an action on the note, if he can establish an equitable or beneficial ownership.

RIGHT OF SURVIVING PARTNER TO SUE AS REAL PARTY IN INTEREST.

6. Where, on the dissolution of a partnership, the outgoing partner takes from a debtor a note, in which are included debts due to each partner individually and to the firm, and after the outgoing partner's death his executrix turns the note over to the surviving partner, the latter may maintain suit thereon as administrator of the partnership estate, though the code provides that every suit shall be prosecuted in the name of the real party in interest.

FORECLOSURE—LIMITATIONS—PERSONAL DECREE.

7. Where the statute of limitations has run against a note secured by a mortgage, there cannot be a personal judgment, though there may be a foreclosure of the lien for the amount due on the note.

From Grant: MORTON D. CLIFFORD, Judge.

Suit by D. G. Overholt, individually and as administrator of the partnership estate of John Muldrick, deceased, against David D. Dietz. The plaintiff, by his complaint, sets up the previous existence of a copartnership between himself and John Muldrick, and his appointment as administrator of the copartnership estate upon the death of Muldrick; the execution by defendant to Muldrick, on

September 17, 1891, of a promissory note for \$1,267.97, payable in one year, with interest at 10 per cent, and a mortgage on certain real property to secure its payment. It is further alleged, in substance, that the note and mortgage were executed to and accepted as partnership property by Muldrick, who duly endorsed, assigned, and transferred the same to the firm of Overholt & Muldrick, by reason whereof said firm became its equitable owner, and that since the death of Muldrick the said D. G. Overholt, individually and as administrator of the copartnership estate, has been and now is the owner and holder thereof; that said note is long since due, etc.; with a prayer for a decree of foreclosure. The answer denies specifically all the allegations of the complaint, except as to the death of John Muldrick, the execution of the note and mortgage, and the ownership of the premises, and alleges that these papers were executed and delivered to Muldrick as his property, and that plaintiff wrongfully obtained possession thereof. The plaintiff moved the court to strike out many of the denials and all of the affirmative matter contained in the answer, but without success, and, the court having decreed a dismissal of the suit, he appeals. REVERSED.

For appellant there was a brief over the name of *Stillman, Leedy & Pierce*, with an oral argument by *Mr. A. D. Leedy*.

For respondent there was a brief over the name of *Dustin & Marks*, with an oral argument by *Mr. Melville Dustin*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

1. Plaintiff's first assignment of error is directed to the order overruling his motion to strike out the denials in the answer relative to the indorsement and assignment of the note and mortgage to the firm of Overholt & Muldrick and plaintiff's ownership thereof, it being insisted that

the end intended to be subserved thereby is to raise an issue as to whether the plaintiff is the real party in interest, and that said answer is manifestly insufficient for that purpose. There was no attempt to set up that plaintiff was not the real party in interest. Under the authorities cited, such a defense should be specially pleaded, and facts stated showing who the real party may be: *Curtis v. Gooding*, 99 Ind. 45; *Mathis v. Thomas*, 101 Ind. 119.

2. The evident purpose of these denials was to controvert plaintiff's allegation of ownership of the note and mortgage, and they were certainly not only relevant and competent, but effective, to raise that issue. Without ownership of these documents, legal or equitable, plaintiff could not recover, or be entitled to foreclose; and the denials put the burden upon him to establish this important and essential fact by proof. Counsel is therefore mistaken in defendant's purpose, and, no other reason having been advanced why the motion should have been sustained, we hold that the assignment is without merit.

3. We come now to determine whether plaintiff has established ownership, so as to entitle him to sue upon the note. Prior to September 16, 1890, he and Muldrick were partners, engaged in the mercantile business under the firm name of Overholt & Muldrick, but on that day the partnership was dissolved, Muldrick withdrawing from the business. Plaintiff testifies relative to the dissolution, in substance, that, when an inventory had been taken of the property, Muldrick concluded that he would take the notes and accounts, and that witness could have the merchandise, being of about equal value, namely, \$12,000; that Muldrick took the notes and accounts and settled up the business, paid off the company debts, and was to get his money out of them for his part of the merchandise, and witness took the merchandise with the understanding between them that, when the company debts were paid out

of the notes and accounts and Muldrick had received his pay for one-half interest in the merchandise, the residue thereof should remain the property of the partnership; that in 1891 Muldrick came to the store, and said that Dietz wanted to settle up, and obtained witness' individual account against him of \$43.32, as well as the partnership account of \$571, and subsequently took Dietz's note, payable to himself, for \$1,267.97, being the note sued on, having also included therein a claim of his own against Dietz of \$653.65, the three amounts or claims going to make up the face of the note, and that the note and mortgage were given to him by the executrix of the last will and testament of John Muldrick; that, subsequent to such dissolution, namely, in March, 1895, witness made an assignment of his effects for the benefit of his creditors; that at the time Muldrick claimed that witness owed him about \$8,000, and would not, on that account, turn over to witness the notes and accounts of the partnership, and for that reason he did not include them in his schedule attached to the deed of assignment; that thereafter, on June 20, 1896, they had a partial settlement of their transactions, but the notes and accounts were not a subject of consideration, or included therein. The contract executed at the time shows that Overholt, being indebted to Muldrick on account of the partnership in the sum of \$7,173.47, agreed to convey to him his interest in certain partnership real property, specifically designated and described, valued at that sum. The assignment matter was finally settled out of court. There is no evidence showing any indorsement or assignment of the note by Muldrick to the firm, and the only transfer made was by Mrs. Jennie Muldrick, executrix, giving it into possession of the plaintiff. It appears further that a memorandum of the note is contained in the executrix's inventory of John Muldrick's estate, showing that the interests of the respective parties therein, namely,

Overholt's individually, Overholt & Muldrick's, and Muldrick's individually, were as stated by Overholt in his testimony, and that when it came into the possession of the latter he caused it to be inventoried as partnership property at the principal sum of \$571.

To summarize, without extended comment, we take it that the testimony establishes these facts: (1) The existence of a copartnership between plaintiff and Muldrick; (2) the dissolution thereof by mutual consent, the plaintiff taking the merchandise, and agreeing to pay Muldrick one-half the value thereof, the notes and accounts being turned over to Muldrick to collect and pay the partnership liabilities, and, after their satisfaction, one-half the remainder to be applied to the payment of plaintiff's individual liability to Muldrick; (3) the execution by Dietz, the defendant herein, to Muldrick, of the note in question, which included plaintiff's individual account against him of \$43.32, the partnership account of \$571, and Muldrick's individual account of \$653.65, and of the mortgage to secure the payment thereof; (4) the assignment by plaintiff for the benefit of his creditors, and a schedule of his assets, from which his interest in the notes and accounts of the partnership was omitted; (5) the partial settlement between plaintiff and Muldrick, whereby plaintiff conveyed to him his interest in certain real property of the copartnership in satisfaction of his demand, and wherein the notes and accounts were not a subject of consideration; (6) the settlement of the assignment matter out of court; and (7) the delivery of the note and mortgage by Mrs. Muldrick, as executrix, to the plaintiff, as administrator of the copartnership estate. Some of these facts are in dispute, but we think they are established. The manner of the inventory by the executrix and the administrator of the partnership estate cannot affect the real fact of ownership, and plaintiff's omitting to schedule his

interest in the partnership notes and accounts when he made his assignment can do no more than affect the credibility of his testimony regarding his continued ownership in such property; but notwithstanding, we are convinced that the facts are as above stated.

4. The assignment matter having been settled out of court, plaintiff's interest in such notes and accounts was not affected thereby.

5. Under the code practice, every suit shall be prosecuted in the name of the real party in interest. If, however, the subject-matter of the controversy be a note, and the plaintiff a person other than the payee to whose order it is made payable, it is not always necessary that he show an indorsement, or even an assignment by a separate instrument, to enable him to recover. It is enough that he establish an equitable or beneficial ownership of the instrument, even though he may not have the legal title, and, being such equitable or beneficial owner, he is entitled to recover. The proposition is so well established that it needs but little citation of authority in its support: *Weeks v. Medler*, 20 Kan. 57; *Warnock v. Richardson*, 50 Iowa, 450; *Spurrier v. Briggs*, 17 Ind. 529; *Garner v. Cook*, 30 Ind. 331; *Heartman v. Franks*, 36 Ark. 501.

6. The circumstances under which the note was taken gave plaintiff, both in his individual and representative capacity, a direct interest therein, although it is doubtful whether or not this interest is sufficient of itself to enable him to maintain the suit, either in his individual capacity or as administrator, in view of the fact that the note is payable to Muldrick. The instrument, however, came legitimately into the hands of the executrix of his will, who was entitled, if she had seen proper, to sue upon it in her representative capacity, and enforce its payment. For some reason, not apparent, she chose rather to turn it over to plaintiff, and when he applied for it she gave it to him,

with the view, we must assume, that he should enforce collection in her stead, seeing that he was also interested in the paper. Having thus acquired the rightful possession thereof, we are of the opinion that he was equitably entitled to sue upon it in his representative capacity. As an authority of some analogy in support of this view, see *McDowell v. Bartlett*, 14 Iowa, 157. We come the more readily to this conclusion as Dietz has made no defense except to claim payment to Muldrick of \$110 upon the note, to which he is entitled, and seeks to defeat a decree upon the sole ground that it would not protect him from being again harassed for the same cause. The fallacy of this view is apparent, however, as the whole matter will be fully disposed of by the result of this litigation.

7. The statute of limitations has run against the note, and hence there cannot be a personal decree; but plaintiff is entitled to a foreclosure of the mortgage and sale of the property to satisfy the demand.

Under the testimony, plaintiff is entitled to \$150 as a reasonable attorney's fee for prosecuting the suit, and that amount will be included in the decree. The adjustment of the relative interests of the parties concerned in the proceeds of the sale must be a matter for future settlement. The decree of the trial court will be reversed, and one here entered in accordance with this opinion.

REVERSED.

Decided 15 June, 1908.

STERLING v. STERLING.

[72 Pac. 741.]

PARTITION—WHAT DECREE IS APPEALABLE—STATUTES.

1. Sections 441, 442, and 444, B. & C. Comp. contemplate an interlocutory decree defining the rights of the respective parties in the land of which partition is desired, and deciding whether it shall be divided or sold, to be followed by a final decree upon a consideration of the report of the referees, and this last is the final order contemplated by Section 547, B. & C. Comp. that must be appealed from, though on the appeal intermediate orders involving the merits, and necessarily affecting the decree, may be reviewed: *Walker v. Goldsmith*, 14 Or. 125, questioned and explained.

PARTITION — NECESSITY OF POSSESSION BY PLAINTIFF.

2. Under Section 435, B. & C. Comp. the plaintiff in a partition suit must allege possession of the property to be divided as a tenant in common with the defendants, or the pleading is demurrable, unless the suit is brought by one or more tenants in common of a vested remainder or reversion.

PARTITION — INSUFFICIENT ALLEGATION OF POSSESSION.

3. A complaint in partition alleging that plaintiff and defendants are tenants in common of the property sought to be partitioned does not plead that plaintiff is in possession, for there may be an ownership as a tenant in common without possession.

CURING DEFECTIVE COMPLAINT BY ANSWERING.

4. The defect in the complaint in a partition suit arising from a failure to aver that the parties were in possession of the property is not cured by an allegation in the answer that the lands described in the complaint are a part of the lands involved in a former partition suit between the parties, and that the ownership was there determined, where plaintiff in his reply denies this allegation, and on the trial offers evidence showing that the lands involved in the former suit were not the lands embraced in the complaint.

From Union: ROBERT EAKIN, Judge.

Suit by Henry V. Sterling against Geo. W. Sterling and others, in which defendants appeal from a decree against them.

REVERSED.

For appellants there was a brief over the name of *Mr. John H. Lawrey*.

For respondent there was a brief over the firm name of *Ramsey & Oliver*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit for the partition of real property. The complaint alleges that "plaintiff and defendants are the owners as tenants in common" of the property sought to be partitioned, that they each own an undivided fourth thereof in fee, and that plaintiff is desirous of having his portion set off to him so that he may occupy and use the same separate from the defendants. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit being overruled, the defendants answered, denying the plaintiff's title, and for an affirmative defense alleging, in substance, that in June, 1901, the defendants commenced a suit against the plaintiff for partition of certain lands in Union County, includ-

ing those in controversy, in which they had an undivided three fourths interest and the plaintiff an undivided one fourth; that such proceedings were thereafter had in the suit that a partition was made, and the three fourths belonging to defendants set off to them in one body and the plaintiff's one fourth to him; that after the commencement of the suit the plaintiff's one-fourth interest was seized under an execution issued on a judgment against him, and sold to J. H. Lawrey, who received a sheriff's deed conveying to him all the plaintiff's right, title, and interest in the property, long prior to the institution of this suit; that at the commencement thereof plaintiff had no right, title, or interest in or to the property sought to be partitioned. The reply denies the material allegations of the answer. Upon the issues joined a trial was had, and the court found that plaintiff and defendants were the owners of an undivided fourth, each, of the property described in the complaint, as tenants in common, and in possession thereof; that the land could be divided, and appointed referees, who made partition accordingly, and filed a report of their proceedings, which was confirmed, and a final decree entered. From this decree the defendants appeal, insisting that the complaint does not state facts sufficient to constitute a cause of suit, because it does not allege that the plaintiff and defendants were in possession as tenants in common of the property sought to be partitioned at the time of the commencement of the suit, and that there was no proof that the plaintiff owned any interest therein.

1. It is urged by the plaintiff that these questions cannot be considered on this appeal, because it is taken from the decree confirming the sale, and not from that ascertaining and determining the rights of the parties and directing the partition. In some jurisdictions it is held that a decree of partition and one confirming the report of the referees made in pursuance thereof are separate and

distinct decrees, and that an appeal from the latter does not bring up for review questions arising on the former: *McRoberts v. Lockwood*, 49 Ohio St. 374 (34 N. E. 734). But this is under a statute essentially different from that of this state. Sections 441 and 442 (B. & C. Comp.) of our statute, defining the procedure in a partition suit, provide that the rights of the several parties plaintiff and defendant may be put in issue, tried, and determined, and that, if it be alleged in the complaint, or established by the evidence to the satisfaction of the court, that the property, or any part thereof, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale, and for that purpose may appoint one or more referees; otherwise it shall decree a partition according to the respective rights of the parties, and shall appoint referees therefor. Section 443 defines the duties of the referees, provides the manner in which they shall make the partition, and requires them to report their proceedings to the court. Section 444 provides that "The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees. Upon the report being confirmed, a decree shall be given that such partition be effectual forever, which decree shall be binding and conclusive (1) on all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property or any part thereof after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life; (2) on all persons interested in the property who may be unknown, to whom notice shall have been given of the application for partition by publication,

as directed by section 439; and (3) on all persons claiming from such parties or persons, or either of them." The only decree in a partition suit, therefore, that the statute declares to be "effectual forever," and "binding and conclusive," is that entered upon the confirmation of the report of the referees. All orders or decrees in the regular course of proceedings prior to that time are merely interlocutory and preliminary to a final decree. Sections 441 and 442 provide for an interlocutory decree determining the rights of the respective parties and directing a sale of the property, or its partition. Section 444 alone provides for a decree that such partition shall be effectual if the court confirms the report of the referees, and declares that it "shall be binding and conclusive" upon parties and privies. This is the only final decree contemplated by the statute. Such was the holding of this court in *Bybee v. Summers*, 4 Or. 354, and is the decision of other courts under similar statutes. Our statute in the matter of the partition of real property, so far as the question now under consideration is concerned, is substantially the same as in New York and California (Ann. Code Civ. Proc. N. Y. 1885, § 1557; Code Civ. Proc. Cal. § 766); and in both states the appeal must be taken from the decree confirming the report of the referees, and not from that ascertaining and determining the rights of the parties. Upon such an appeal any intermediate order involving the merits, and necessarily affecting the decree may be reviewed: *Tilton v. Vail*, 117 N. Y. 521 (23 N. E. 120); *Gates v. Salmon*, 28 Cal. 320; *Peck v. Vandenberg*, 30 Cal. 11. The appeal in this case was, therefore, properly taken, and the validity and regularity of the several intermediate orders and decrees may be reviewed and considered thereon.

In reaching this conclusion we have not overlooked *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537), in which the preliminary decree of partition in that case was held to be

final in the sense that an appeal could be taken therefrom by the appellant. The language of the decree does not appear from the opinion, nor from the statement of the case. An examination of the briefs of counsel discloses that the question of the regularity of the appeal is not mentioned therein. It seems to have been suggested at the hearing for the first time. The question is not discussed to any extent in the opinion, and no reference is made to the provisions of the statute or the decisions of other courts holding contrary doctrine under statutes similar to ours, nor even to the former decisions of this court, holding that such order or decree was merely interlocutory, and not final. The decree from which the appeal was taken was one settling the rights of the codefendants in the property sought to be partitioned as between themselves, and determining finally the right of the appealing defendant. It may have been final and conclusive as to him, and therefore appealable. But, if the case is supposed to hold that an appeal will lie, as a general rule, under our statute, from a decree settling the rights of the parties in a partition suit, it must no longer be regarded as authority.

2. The remaining question is whether the complaint states a cause of suit. The statute provides (B. & C. Comp. § 435): "When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, or when several persons hold as tenants in common a vested remainder or reversion in any real property, any one or more of them may maintain a suit for the partition of such real property, according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appears that a partition cannot be had without great prejudice to the owner." It is plainly seen under this section that, unless the suit is

brought by one or more tenants in common of a vested remainder or reversion, it should be alleged in the complaint, and proven on the trial, if denied, that the plaintiff and defendants were in possession as tenants in common of the property described in the complaint at the time of the commencement of the suit. These are the primary facts, upon which the right to a partition is based, and upon which the jurisdiction of the court depends. If the plaintiff is out of possession, he cannot maintain a suit for partition until he first regains his possession in some appropriate proceeding. To invoke the jurisdiction of the court to make the partition, he must allege that he is in possession of the property as a tenant in common with the defendants. This is the plain requirement of the statute, and in accordance with the decisions of this and other courts: *Farris v. Hayes*, 9 Or. 81; *Savage v. Savage*, 19 Or. 112 (23 Pac. 890, 20 Am. St. Rep. 795); *Windsor v. Simpkins*, 19 Or. 117 (23 Pac. 669); *Marx v. La Rocque*, 27 Or. 45 (39 Pac. 401); *Bradley v. Harkness*, 26 Cal. 69; *Alsbrook v. Reid*, 89 N. C. 151.

3. The plaintiff argues that the averment in the complaint that the plaintiff and defendants are tenants in common implies that they are each in possession of the property. But one may own property as a tenant in common with another, and not be in possession. He may have been ousted by his co-tenant or by a third party. Such ouster does not destroy his title, or make him any the less a tenant in common, but it does deprive him of a right to maintain a suit for partition until he regain possession. The complaint is, therefore, insufficient, and the demurrer should have been sustained.

4. But it is argued that the defect was cured by the answer. The position is that the answer admits title and tenancy of the plaintiff in June, 1901, a year or more before the commencement of the present suit, and that such

title will be presumed to continue until the contrary appears. The answer does allege that the lands described in the complaint were a part of the lands involved in a former partition suit between the defendants and the plaintiff. This the plaintiff, in his reply, denies, and on the trial introduced evidence showing that the lands involved in the former suit were not the lands described in the complaint; so that the defect in the complaint in not alleging that the plaintiff and defendants were in possession as tenants in common of the property therein described was not cured.

For these reasons the decree of the court below must be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Decided 19 October, rehearing denied 26 November, 1903.

STATE v. ARMSTRONG.

[73 Pac. 1022.]

CHANGE OF VENUE — ABUSE OF DISCRETION.

1. The determination of an application for a change of venue is a matter for the exercise of discretion by the trial court, and its decision will not be reversed unless it appears that an injustice has resulted. In the present instance it is clear that the refusal to change the place of trial was not error.

COMPETENCY OF JUROR — DISCRETION.

2. On a challenge of a juror for actual bias the determination of his competency is largely discretionary with the trial judge, reviewable for abuse.

COMPETENCY OF JURORS — PRECONCEIVED OPINION — BIAS.

3. Where the opinions of jurors in a criminal case were based on mere hearsay statements, none of the jurors having talked with any person assuming to give the facts of his own knowledge, and the jurors asserted that their opinions formed were not such as they would be willing to act on at the present time, and that they considered themselves competent to try the case on the testimony, the denial of a challenge for actual bias was not error, though the jurors stated that it would require strong evidence to remove their opinions.

ERROR MADE HARMLESS BY SUBSEQUENT CONDUCT.

4. Error, if any, in sustaining an objection to a question asked of a juror as to whether any prejudice existed in his mind against the defendant was rendered harmless where almost the identical question was subsequently asked, and answered in the negative, without objection.

REDUCING INSTRUCTIONS TO WRITING — TECHNICAL ERROR.

5. In Oregon the rule requiring a trial judge to reduce his charge to writing, if requested to do so, and to file it with the clerk (B. & C. Comp. § 132, subd. 6), which

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445	25
445	26
43	207
446	348
446	489
447	488
43	207
448	174

is generally held to be mandatory, is modified by Section 1484, B. & C. Comp., providing that the supreme court shall give judgment without regard to technical errors which do not affect the substantial rights of the parties, so that the failure of a trial judge to write out certain passages from a printed book will not require a reversal, where the extracts were read without comment, and were substantially the same as the written instructions. The failure of the judge to write down the entire charge and file it was a technical but not a material error, it being manifest that the passages read did not modify or change the written charge.

PROCEEDINGS BEFORE TRIAL — PLACE OF CONFINEMENT.

6. Where during defendant's incarceration for homicide before his trial threats of lynching were made, an order directing defendant's removal to another place of confinement for his protection was not an error of which he could complain.

From Baker: ROBERT EAKIN, Judge.

Pleasant Armstrong appeals from a judgment of death following a conviction of murder. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. M. M. Godman* and *Mr. Geo. J. Bentley*.

For respondent there was a brief over the names of *Samuel White*, District Attorney, and *A. B. Winfree*, with an oral argument by *Mr. Andrew M. Crawford*, Attorney-General, and *Mr. White*.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendant appeals from a judgment of the circuit court, rendered upon a verdict convicting him of murder in the first degree. There are three principal assignments of error touching the rulings of the trial court, namely, in refusing to grant a change of venue, in disallowing defendant's challenge for cause to certain jurors, and in orally commenting upon and explaining certain instructions given in writing at the request of the defendant. Other assignments are noted, but are not especially insisted upon, and need but casual examination.

1. The crime of which defendant was convicted was committed December 25, 1902. Upon being arrested soon after, he was confined in the county jail at Baker City until about the second of March, 1903, when he was removed therefrom in anticipation of a raid about to be made upon

the jail by a body of men with the evident purpose of taking him therefrom and lynching him. The removal was in pursuance of an order of the judge of the circuit court, made upon the motion of the district attorney, and the defendant was confined at Portland until the twentieth of March, when he was returned to Baker City for trial. Thereupon the defendant, by his counsel, moved for a change of venue to Umatilla County on account of the prejudice existing against him in the Eighth Judicial District. The motion is based upon the affidavits of defendant, his counsel, and others, showing that deceased was a teacher in the public schools, and well and favorably known throughout Baker County; that the people and citizens of all parts of the county had become much incited and incensed against defendant on account of the alleged offense, and had made numerous threats against his life; that on the night of March 2, 1903, a body of from one hundred to one hundred and fifty armed and masked men gathered at the county jail, with the avowed purpose of lynching the defendant, and demanded his person in the name of the taxpayers; that there existed a strong prejudice in the minds of the people of Baker, Union, and Wallowa counties, engendered by sensational and inflammatory articles printed in the local newspapers and elsewhere; that it was deemed unsafe to proceed with the trial in Baker County, because, as defendant was informed and believed, should any other verdict than murder in the first degree be rendered, the citizens of the county, in pursuance of their threats, would hang him, or he would be shot in the courtroom; and that a jury free from prejudice against the defendant, before whom he could expect to secure a fair and impartial trial, could not be obtained in the county. It was further shown that threats had been made against one of the attorneys for

defendant, to the effect that, unless defendant was speedily tried and convicted, he (the attorney) would be summarily dealt with, and, by the affidavits of persons from different localities of the county, that a deep-seated prejudice existed in their respective localities and throughout the whole county against the defendant. A copy of but one of the newspaper articles alluded to was appended to and made a part of the affidavits. This purports to detail the facts and circumstances attending the attempted lynching. Among other things, it is related that the original nucleus of the mob came from North Powder and vicinity, and arrived at Baker City in small parties, at different times during the day and evening, consisting in all of from sixty to seventy-five men, being for the most part miners, ranchers, and railroad men, who were acquainted with the family of the murdered girl; that the mob was augmented to something like two hundred persons from the usual crowd of patrons of the all-night places; that the attempt of the North Powder people to take the law into their own hands was probably suggested by the action of the court in postponing the trial until March 23, and that the bitter feeling on the part of the neighbors of the murdered girl was greatly intensified by the report that counsel for Armstrong would try to create sympathy for him at the trial by attempting to prove a mutual understanding between Armstrong and Miss Ensminger to commit suicide together because of parental opposition to their marriage.

The state filed in refutation of the above proofs the affidavits of numerous citizens of the county, all deposing to the effect that they had long been residents of the county; that they had frequently conversed with citizens from all sections thereof, and were familiar with the feelings and sentiment of the people toward the defendant, and that whatever prejudice or bias there might exist against him in Baker County was confined to the imme-

diate locality of the tragedy, and to the family of the deceased and their immediate friends and acquaintances; that Baker County is large and populous, and divided by mountain ranges into small and diverse neighborhoods, which have but little intercourse one with the other; and that in the opinion of the affiants a fair and impartial jury, without prejudice against the defendant, could be obtained within the county. Upon this showing the court overruled the motion for a change of venue, and required the defendant to go to trial, of which he complains.

It is a fundamental principle that the accused in cases of felony is entitled to a trial by an impartial jury, and, if it cannot be had in the county where the offense was committed, the statute accords him a change of venue, so that he may have such a hearing as the constitution guarantees. It is self evident that an impartial trial cannot be had where an unprejudiced jury cannot be found, and, if the conditions are such that the entire people of the county, or a large proportion of them, are so excited and incensed against the accused that the selection of a jury free from such influences and bias could not be reasonably expected therein, then the accused should have the benefit of a change of venue, as otherwise there would be a clear disregard of his constitutional right. Such conditions, if they exist, may be made to appear by affidavit,* which mode was appropriately adopted in the case at bar. It is settled law in this state, and elsewhere under similar statutes, that the allowance of a change of venue is largely, if not exclusively, a matter for the exercise of the sound discretion of the trial court. This discretion, however, is judicial in its character, and is subject to be reviewed for an abuse thereof, where palpable injustice has been done: *State v. Pomeroy*, 30 Or. 16, 19 (46 Pac. 797); *State v. Sav-*

*NOTE—See Section 1250, B. & C. Comp.—REPORTER.

age, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128); *State v. Humphreys*, 43 Or. 44 (70 Pac. 824). It is admitted there was an attempt to lynch the defendant, which is sufficient in itself to show the existence of a bad state of feeling against him within the county; but, if the newspaper report made a part of the showing is to be credited, the nucleus of the mob (and it can be designated by no better or more appropriate term, because it was an unlawful and intolerable assembly, purposing to override the laws intended for good government) originated in the vicinity where the tragedy was enacted, and was augmented by a class that usually patronizes the all-night resorts supposedly in and about Baker City, the place of trial. This does not show a general uprising of the people throughout the county, incensed by the commission of the crime, but rather that it was confined to residents of the immediate vicinity where it was committed, and others from the local haunts referred to; so that the body of the county in general was not shown thereby to be infected by ill will or prejudice against the defendant. True, it is asserted by the affidavits that such prejudice did exist among the people throughout the county to such an extent that the defendant could not expect a fair and impartial trial by a jury selected therefrom, but this is refuted by many affidavits on the part of the state, showing that in the opinion of the affiants a fair and impartial jury, free from bias or prejudice, could readily be obtained. It is further asserted that the alleged prejudice is the result of sensational and inflammatory articles published in the local newspapers at Baker City and elsewhere. But none of these articles are set forth, either by copy or exhibit, except the one giving an account of the attempted lynching, which appears to be a calm and dispassionate narrative of the facts pertaining thereto, published as a matter of news, without any attempt to stir up prejudice or manufacture public

opinion, either for or against the accused. There was apparently no effort or design, even inferentially, to prejudice the cause of the defendant, or to declare what should be his fate, or to indicate to the public or those who might be called upon to dispense justice what their verdict should be in the premises. Some threats, it appears, had been made to deal with the defendant summarily if he was not convicted of murder in the first degree, and to visit punishment upon one of his counsel unless a speedy trial was had and conviction ensued. But the source of these threats was not disclosed, and it is not shown that they were the promptings of public sentiment existing within the county against the accused, so that it would probably affect or vitiate the minds of any jury that might be obtained therein. These circumstances, together with the fact that a jury was obtained from a part of the regular panel and a special venire of forty men, lead us to conclude that the trial court was not in error in refusing to allow a change of venue to another county. The ruling was clearly not attended by an abuse of the sound and judicial discretion reposed in the trial courts, and should therefore be sustained.

2. The next assignment of error relates to the ruling of the court disallowing defendant's challenges for actual bias taken to the jurors Wyatt, Perry, Knoblauch, Underwood, and Wilson. We will not stop to inquire whether defendant is in a position to raise this question, but will assume that he is, and consider the matter upon its merits. There is a similarity in the examination of all these jurors on their *voir dire*, and we will only indicate the general character of their testimony, without noticing it in detail. They were all from points outside of Baker City, the place of trial, and away from the scene of the homicide. They had read accounts of the tragedy in the newspapers of their county and others from abroad, had discussed the affair

more or less with their families and neighbors, and had formed and expressed opinions based upon such accounts and from what they had heard other persons relate touching it; but none of them had talked with any witness in the case, that he was aware of, or any person assuming to give the facts from his own knowledge, and all information acquired was entirely from hearsay. Some of these jurors, on their examination in chief, indicated that they would go into the jury box with the opinions they had formed, and that it would take evidence, sworn testimony, to remove the same; one of them saying that he hardly thought he would start in the case with his mind entirely free and unbiased; another that it would require a good deal of evidence to remove the opinion he had; and another that it would require "pretty solid testimony" to remove it. One of them signified that his opinion was fixed until removed, but all of them, either by further elucidation in the examination in chief or by cross-examination in answer to questions propounded by the court, expressed a conscientious belief that they could go into the jury box without any bias or prejudice against the defendant, disregard their respective opinions theretofore formed or expressed, and hear and decide the case alone upon the testimony and the law given them at the trial. Most, if not all, of them asserted that the opinion formed was not such as they would be willing to act upon at the present time.

By our statute, upon the trial of a challenge for actual bias, the opinion of the juror, formed or expressed upon the merits of the cause, derived from what he has read or heard, is not in itself sufficient to justify the allowance of such a challenge.* The statute referred to has been construed by this court so many times that it has now become well understood. If the trial court is satisfied, from an

*NOTE.—See Section 123, B. & C. Comp.—REPORTER.

appropriate examination of the juror, that he can conscientiously disregard such an opinion, and hear and determine the case impartially upon the facts and the law as given at the trial, the challenge may be properly denied. Safeguarded by a careful scrutiny of the trial courts to determine that the juror is without bias or prejudice as a trier of the cause, the statute is not inimical to the constitutional right of the accused to a trial by an impartial jury. It recognizes the idea, patent to every one, that men of intelligence will think upon matters of general information, though obtained through the ordinary avenues by which common intelligence is dispensed, and will very naturally arrive at some conclusion or opinion relative thereto, and, being of social instincts, will discuss such matters in their intercourse with their fellow men, and express the opinions thus formulated. It also very properly accredits intelligence with the powers of discrimination and right reasoning, uninfluenced by preconceived notions and vague opinions formed upon insufficient knowledge; and that men of honest impulses, controlled by an innate sense of justice, will be able to lay aside and disregard impressions and opinions of this character, and to determine causes upon sworn testimony alone, governed by the rules of law applicable thereto as given by the court. It is but reasonable to believe that upright and conscientious jurors can and will thus deport themselves when called upon to administer justice. Were it otherwise, the jury system would cease in a great measure to be the palladium of civil rights, and in many cases, in the present time of rapid and wide dissemination of the accounts of important and extraordinary events, it would be almost impossible even to secure twelve men of a community or county eligible as jurors in the trial of a cause. There would at least be an elimination of those who read and inform themselves, and a relegating of the administration

of justice to a class of citizens not the more intelligent, contrary to the spirit of the jury system, and the constitution and laws of the state. Where, therefore, the information acquired upon which the opinion is formed and expressed is hearsay in character, and does not emanate from a source purporting to speak to a personal knowledge of the facts, it does not alone disqualify the juror. The determination, consequently, of a juror's competency is necessarily and primarily a question for the trial court, which should ever keep in mind the ultimate object to be attained, namely, a trial by a fair and impartial jury; it being, as above indicated, a matter largely for the exercise of a sound discretion, and the findings of the trial court upon a challenge for actual bias are not the subject for review unless there has been an abuse of such discretion, or it has been arbitrarily exercised to the injury of the litigant: *State v. Saunders*, 14 Or. 300 (12 Pac. 441); *Kumli v. Southern Pac. Co.* 21 Or. 505 (28 Pac. 637); *State v. Ingram*, 23 Or. 434 (31 Pac. 1049); *State v. Brown*, 28 Or. 147 (41 Pac. 1042); *State v. Kelly*, 28 Or. 225 (42 Pac. 217, 52 Am. St. Rep. 777); *State v. Olberman*, 33 Or. 556 (55 Pac. 866); *State v. Savage*, 36 Or. 191, 202 (60 Pac. 610, 61 Pac. 1128); *State v. McDaniel*, 39 Or. 161 (65 Pac. 520).

3. Measured by this enunciation of the law and these authorities, it is quite clear that the jurors challenged in the present case were, under the findings of the trial court, not disqualified to sit in the cause. None of them had a fixed and settled opinion, nor had they such an opinion as to the guilt or innocence of the accused that they could not disregard upon the trial, and a verdict render according to the sworn testimony there adduced and the law as given them by the court. The expression of one of the jurors that it would require a good deal of evidence to overcome the opinion he had formed, and of another that it would have to be "pretty solid testimony," must be read

in the light of the examination then being prosecuted by the defendant's attorney, which was calculated to lead them to such an assertion; but, when their attention was called to the principle that their verdict must be based alone upon the testimony adduced at the trial, they signified a conscientious and honest belief that they could disregard such opinion, and the trial court was impressed that they could, and, finding no bias or prejudice against the defendant, disallowed the challenge. We can find no reason under the law for disturbing the findings, and hence there was no error in denying any of the challenges interposed.

4. During the course of the examination the juror Wilson was asked on his *voir dire*, in effect, whether, from what he had read and heard, and the opinion he entertained of the matter, there existed any prejudice in his mind against the defendant. To this an objection was made by counsel for the state, which was sustained, and an exception saved, and error is predicated thereon. The answer to this is to be found in the fact that defendant's counsel subsequently propounded almost the identical question, which the juror answered, without objection. Counsel further inquired of the juror directly whether he had any bias or prejudice in the case one way or the other, to which he answered in the negative. Therefore the error, if any was committed in the premises, was cured.

5. The next assignment of error pertains to the manner of the court's instructing the jury. In compliance with the defendant's request the instructions were given in writing, but after the jury had been out some time, they returned, and the foreman announced that one of the jurors wanted further instruction on a point of law, namely, as to what constitutes a reasonable doubt, whereupon the court said: "The instruction I gave you on the question of reasonable doubt is taken largely from expressions of our own supreme court, and I have one of them before

me in which this question was one of the principal questions relied upon in the case, and I find the language of the legal opinion is almost the exact language I have read to you, although I have some additional items in my list, which I have taken from other decisions of the supreme court. I will reread this to you;" and reread the instruction as follows:

"It devolves upon the state in this action to establish the guilt of the defendant to your satisfaction beyond a reasonable doubt. And I instruct you that such a reasonable doubt arises when the evidence has not established the guilt of the defendant to your entire satisfaction. This doubt must be a reasonable doubt arising from a fair view and reasonable consideration of all the evidence. A reasonable doubt must be such a doubt existing in the mind as, in his own affairs, would cause a reasonably prudent or careful man to pause or hesitate to act in grave or important affairs of life. It must be a doubt for which a good reason exists, arising out of the testimony or the want of testimony. A reasonable doubt is not a mere possible doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves your mind in such a condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge. The law does not require a demonstration—that is, such a degree of proof as, excluding the possibility of error, produces absolute certainty—because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

The court then said: "The opinion of the supreme court that I have before me sets out an instruction that they quote with approval. I will read that also;" and then read as follows:

"A reasonable doubt, gentlemen, is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the mind of the jury in that condition that they cannot say that they feel an abiding conviction

to a moral certainty of the truth of the charge. A reasonable doubt is not every doubt. It is not a captious doubt. It is such a condition of mind, resulting from the consideration of the evidence before you, as makes it impossible for you, as reasonable men, to arrive at a satisfactory conclusion. It is not a consciousness that the conclusion arrived at may possibly be erroneous, but it is such a state of mind as deprives you of the ability to reach a satisfactory conclusion. A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture."

It will be noted that the matter read from the opinion of this court and having its approval was additional to the instructions given to the jury on the subject in the first instance, but it was in substance the same, without amendment or modification in any particular. The defendant excepted, however, to the whole instruction and to the manner in which it was given, and now insists that the jury were not instructed in this particular in writing, and for that reason he should have a new trial. The statute provides that, if either party require it, and shall at the commencement of the trial give notice of his intention so to do, the charge of the court, so far as it relates to the law and the facts of the case, shall be reduced to writing, without any oral explanation, and filed with the clerk: B. & C. Comp. § 132, subd. 6. The purpose of this statute manifestly is to obviate the difficulty often experienced by parties and their counsel in reducing verbal charges to appropriate form for presenting alleged errors arising thereupon for review, and to prevent any dispute or cavil as to what the real or exact instructions of the court were, and to preserve them intact, without any shading of language or modification of thought or substance. It is appropriate, also, to prevent the trial court from laying particular stress or emphasis upon portions of the instructions that might well be calculated to attract the especial attention of the

jury, and thereby in a manner to control their action to suit the preconceived impressions of the judge as to the outcome of their deliberations. It has generally been held that statutes of this kind are mandatory, and should be strictly observed, and that any substantial noncompliance with their requirements will constitute ample grounds for awarding a new trial, and it cannot make any difference whether the instruction otherwise given than in writing is properly applicable to the facts of the case or not. Such statutes enunciate a right that the party is entitled to, and the courts cannot pare it off or circumscribe its operation without impairing the right itself. As was said by Mr. Justice ELLIOTT in *Bradway v. Waddell*, 95 Ind. 170, 173: "It surely is no hardship to require the court to do exactly what the law commands and the parties request. A line or two more costs but little labor, and prevents confusion, wrong, and error. There is really no excuse for refusing to do what the law commands, and what secures certainty and prevents needless wrangling. But, after all, a sufficient reason for the uniform ruling of this court is that the law commands that all instructions shall be in writing; and the more closely courts, as well as everybody else, are held to strict obedience to law, the better." The precept is enunciated and supported by numerous authorities: *Wheatley v. West*, 61 Ga. 401; *Willis v. State*, 89 Ga. 188 (15 S. E. 32); *State v. Bennington*, 44 Kan. 583 (25 Pac. 91); *State v. Stoffel*, 48 Kan. 364 (29 Pac. 685); *Ellis v. People*, 159 Ill. 337 (42 N. E. 873); *State v. Birmingham*, 74 Iowa, 407 (38 N. W. 121); *State v. Harding*, 81 Iowa, 599 (47 N. W. 877); *Hopt v. Utah*, 104 U. S. 631; *Bottorff v. Shelton*, 79 Ind. 98; *Smurr v. State*, 88 Ind. 504; *Sellers v. City of Greencastle*, 134 Ind. 645 (34 N. E. 534). The Indiana cases are especially valuable, as they are based upon a statute almost identical with our own.

Without else, we would be constrained to hold, in accord

with these authorities, that the action of the trial court in reading the matter from the supreme court report instead of incorporating it in a written instruction and giving it to the jury as written, was error, entitling the defendant to a reversal of the cause, and consequently a new trial. But the Criminal Code contains a provision for the guidance of the appellate court as follows: "After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties": B. & C. Comp. § 1884. This statute, while it does not modify the one above discussed, nevertheless prescribes the character of error for which the judgment of the trial court shall not be reversed; and when it appears from a scrutiny of the whole record that the error relied upon is technical, and does not affect the substantial rights of the defendant, the judgment appealed from will not be disturbed on account of such error. There could be no objection, when the request for further instructions was made, to the trial court's reading from the instructions theretofore given, because they were in writing, and had perhaps been filed with the clerk. What the court said preliminary to reading from the instruction and from the supreme court report did not constitute, in a legal sense, an instruction relating to the law and the facts in the case; but the matter read from the report was plainly an instruction of that character. This was evidently taken down or reduced to writing, as we find it in the record here, but the method employed for so doing is not made to appear, nor is it material in the view we have adopted. There is not the least dispute as to the matter here in the record being the same in every particular as was read from the book to the jury, and the whole of it is here, and we know exactly what it is and its bearing in the case. Fur-

thermore, it is the same in substance as read to the jury from the written instructions, and it went to them without illustration or modification, so that it could not possibly have affected any substantial right of the defendant. This is patent on the record, and we need have no recourse to presumption or inference to make it appear, and, being such, the error of the court in not transcribing the matter read and then reading it to the jury and filing it with the clerk must be classed as a technical error, not affecting any substantial right of the defendant, and is not such, therefore, as will warrant a reversal of the judgment.

We are supported in this view by pertinent authority elsewhere. In *O'Donnell v. Segar*, 25 Mich. 367, it was held that, where the record declares that the trial judge made oral explanations to his written charge, it being stated at length therein what was said, and it appearing that it did not and could not modify or affect the written charge, it did not constitute reversible error. So, it was held in North Carolina, in *Currie v. Clark*, 90 N. C. 355, where the trial court gave oral instructions not differing from those set out in the written charge, and the appellant made no suggestions to the contrary, that it did not constitute ground for a new trial. And the court said in *Hall v. Carter*, 74 Iowa, 364 (37 N. W. 956, 958), where the court read to the jury the pleadings in the case to indicate what the issues were, but did not incorporate them in the written instructions (the jury, contrary to the practice prevailing here, having the right to take the instructions to their room for deliberation): "We do not think this is a good practice. The entire record of the case satisfies us, however, that no prejudice resulted from this error of the court. The third paragraph of the charge presented the issues quite fully, and other paragraphs further presented the issues, and directed the jury as to their duties. Several special findings were returned, which

indicate that the issues were fully understood by the jury. We therefore conclude that the verdict should not be disturbed on the grounds just considered." In further illustration of the principle, see *Fry v. Shehee*, 55 Ga. 208; *Sellers v. City of Greencastle*, 134 Ind. 645 (34 N. E. 534); *National Lum. Co. v. Snell*, 47 Ark. 407 (1 S. W. 708); *Commonwealth v. Barry*, 11 Allen, 263.

6. Another error is assigned to the court's granting an order for the removal of the defendant from the Baker County jail without his consent. This, however, was but a proper and reasonable precautionary measure, adopted for keeping the defendant in custody awaiting his trial, and for his protection against mob violence, and was one of which he could not justly complain. This disposes of all the assignments of counsel, and finding no error affecting any substantial right of the defendant, the judgment of the trial court will be affirmed, and it is so ordered.

AFFIRMED.

Decided 15 June, 1903.

FISHER v. UNION COUNTY.

[72 Pac. 797.]

WRIT OF REVIEW—WHO MAY PETITION FOR—HIGHWAYS.

1. Under B. & C. Comp. § 505, which authorizes any party to a proceeding before an inferior court to have its decision reviewed, a person stated to be a resident in the vicinity of a certain road and to have been a remonstrator against a change in the location thereof is a party to the proceeding, and may petition for the issuance of a writ of review.

COUNTY AS DEFENDANT IN REVIEW OF HIGHWAY PROCEEDINGS.

2. The county being the ultimate responsible party in all road matters, is the proper party defendant in a proceeding to review the action of its county court in laying out, altering or vacating a highway.

HIGHWAYS—TO WHOM WRIT OF REVIEW IS DIRECTED.

3. Under B. & C. Comp. § 509, providing that a writ of review shall be directed to the court, officer or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having custody of its records or proceedings, a writ to review the action of the county court in vacating a road is properly directed to the county clerk, whose duty it is, under B. & C. Comp. § 1008, to keep the records, files, and other books and papers appertaining to said court.

NECESSITY OF PETITION IN PROCEEDING TO VACATE HIGHWAY.

4. Section 912, B. & C. Comp., authorizing county courts to vacate county roads in the manner provided by law, must be considered in connection with section

4788, providing the manner of publishing the petition for vacating the road, and the conclusion then necessarily follows that an application to vacate must be by petition.

PETITION FOR WRIT—SPECIFICATION OF—ERRORS.

5. Under B. & C. Comp. § 506, providing that a petition for a writ of review must describe with sufficient certainty the decision of the inferior court and the errors alleged to have been committed therein, a petition for a review of the action of a county court in vacating a road, alleging that the road described in the notice of application for vacation posted in the courthouse was not the same road specified in the petition for vacation, is a sufficient averment of fact to support the deduction that the county court erred in not dismissing the proceedings to vacate the road for want of jurisdiction, and hence is sufficient.

VACATING HIGHWAY—VARIANCE BETWEEN PETITION AND NOTICE.

6. In view of Section 4783, B. & C. Comp., requiring that notice be given of the hearing of the application for vacating a county road, a variance between the petition and the notice in stating the township in which the road to be vacated ends is fatal to the jurisdiction of the county court.

From Union: ROBERT EAKIN, Judge.

Writ of review by E. Fisher against Union County to review the action of the county court of said county in vacating a county road. From a judgment dismissing the writ, petitioner appeals.

REVERSED.

For appellant there was an oral argument by *Mr. W. M. Ramsey*, with a brief over the name of *Ramsey & Oliver*, to this effect:

I. Jurisdiction is acquired by county courts to lay out, alter or vacate county roads by the presentation of a proper petition, accompanied by proof that notice of the proceeding has been given as required by statute (Hill's Ann. Laws, §§ 4062, 4063, and 4064; *Johns v. Marion County*, 4 Or. 46), and the process of locating or altering is the same as that of vacating: *Vedder v. Marion County*, 22 Or. 264, 270 (29 Pac. 619); *Latimer v. Tillamook County*, 22 Or. 291 (29 Pac. 734); *State v. Green*, 18 N. J. Law, 179.

II. The petition and the notices for the location, alteration, or vacation of a county road, in order to confer jurisdiction upon the county court, must describe the road to be vacated, altered, or laid out with certainty, and, if the beginning point, the intermediate points, if any, or the terminus is not described with certainty, the court will not acquire

jurisdiction of the proceeding. The terminal points must be "specified." Elliott, on Roads and Streets (2 ed.), § 337; Hill's Ann. Laws, §§ 4062 and 4063; *Ames v. Union County*, 17 Or. 600 (22 Pac. 118); *Woodruff v. Douglas County*, 17 Or. 314, 322 (21 Pac. 49); *Fulton v. Earhart*, 4 Or. 62; *Sime v. Spencer*, 30 Or. 340, 341 (47 Pac. 919); *Nelson v. Yamhill County*, 41 Or. 560 (69 Pac. 678); *French Livestock Co. v. Harney County*, 38 Or. 315, 316 (58 Pac. 36).

III. Proceedings to vacate highways must comply strictly with the statutes, or they are void: *Regina v. Jones*, Ad. & E. 684; *James v. Darlington*, 71 Wis. 173 (36 N. W. 834); *Price v. Stagrays*, 68 Mich. 17 (35 N. W. 815); *Miller v. Corinna*, 42 Minn. 391 (44 N. W. 127).

For respondent there was a brief and an oral argument by *Mr. C. H. Finn* to this effect:

I. Unless the petitioner for review shows that he is more than simply one of the public, that he is living on the road to be vacated, or would be injured by its closing, he has not such an interest as will support a writ of *certiorari*: *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 136 (2 Am. Rep. 109); *Shaubet v. S. P. & S. C. R. Co.* 21 Minn. 502; *People v. Wheeler*, 21 N. Y. 82; *Brown v. San Francisco*, 124 Cal. 274 (57 Pac. 82); *Darling v. Boesch*, 67 Iowa, 702 (25 N. W. 887); *Walport v. Newcomb*, 106 Mich. 357 (64 N. W. 326); 6 Cyc. 768; 4 Enc. Pl. & Pr. §§ 166, 172, 176, and 234; *Schuster v. Larned*, 27 Minn. 253; *State v. Barton*, 36 Minn. 145; *State v. Holman*, 40 Minn. 369; *Commissioners of Highways v. Quinn*, 136 Ill. 604; *Taylor v. Commissioners*, 88 Ill. 526.

II. Vacation of county roads does not require definite statement in either petition or notice of the terminals. The road is sufficiently identified by name and general location: *Vedder v. Marion County*, 22 Or. 264 (29 Pac. 619).

III. The petition for the discontinuance of a highway

need not describe it by termini, courses, and distances, or follow the exact description of laying out the road. It is sufficiently certain if it enables the court and commissioners to know and understand, without the possibility of a mistake, what highway is sought to be discontinued: *In re Milford*, 37 N. H. 57; *State v. Adams*, 21 Atl. 937.

IV. In *certiorari* the writ must run to the county court to review road matters, and not to the county: 4 Ency. Pl. & Pr. 180; *State v. Stout*, 33 N. J. Law, 42; *French v. Highway Com'rs*, 12 Mich. 267; *Roberts v. Highway Com'rs*, 24 Mich. 182; *People v. Highway Com'rs*, 30 N. Y. 72.

V. Section 587 of Hill's Ann. Laws requires the writ to be directed to the court, officer or tribunal whose decision is sought to be reviewed, and we submit that Union County is neither a court, an officer nor a tribunal, nor did it make the decision sought to be reviewed.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is an appeal from a judgment of the circuit court for Union County dismissing a writ of review. The petition for the writ, omitting the title, prayer, subscription, and verification, is as follows:

"Now at this time comes the above-named plaintiff, E. Fisher, and by this, his petition, shows to the court and alleges: That the plaintiff resides in the vicinity of the county road hereinafter described, and is one of the remonstrators against the closing and vacation of the same; that heretofore, to wit, on the fourth day of April, 1900, one T. R. Monk and some twenty-five others made application by petition to the honorable County Court of Union County, Oregon, sitting as a board of commissioners for the transaction of county business, for an order of said county court vacating a certain portion of the county road described in said petition, as follows: 'To vacate all that part of a certain public road as follows: Commencing at a point about 50 rods west of the S. E. corner of Sec. 2, Tp. 1 S., R. 38 E., running thence in a northwest dir. and

intersecting a Co. road which runs N. and S. on a $\frac{1}{4}$ Sec. line about 60 rods south of the N. W. cor. of E. $\frac{1}{4}$ of Sec. 2, Tp. 2 S., range 38 E., W. M.'; that said petition of said T. R. Monk, et al., did not specify the beginning, intermediate, and terminal points of the road proposed to be vacated, and no notices were posted in the vicinity of said proposed road, or upon the courthouse, as required by law, stating the time and place when the said T. R. Monk et al. would make the application for the vacation of the road described in the petition; that the said T. R. Monk et al. did post a notice on the courthouse, and made proof that the same notice was posted in the vicinity sought to be vacated, but the road described in said notice was not the same road described in said petition; that thereafter, to wit, on the seventh day of April, 1900, this plaintiff and about 58 others filed a remonstrance in the county court, remonstrating against the closing or vacation of the road described in the petition, and filed proof that each of said remonstrators was a householder residing in the vicinity of the road sought to be vacated, which remonstrance contained more names than there were petitioners on said petition; that thereafter, to wit, such proceedings were had in the county court as that said court appointed viewers and a surveyor to view and survey said county road, and report to the court whether the prayer of said petition ought to be granted; and on the third day of September, 1901, said viewers filed their report, recommending that a certain piece of county road described in the surveyor's field notes and plat attached to said viewers' report be vacated, but the road described in said plat and field notes is not the same road described in said petition or in said notice; that, notwithstanding said defects, such proceedings were had thereafter in said county court that the said county court, by an order made on the sixth day of September, 1901, overruled and denied another remonstrance filed in said court by this plaintiff and 64 others against the vacation of said county road, and ordered that the portion of county road described in said surveyor's plat and field notes be vacated and closed, to the injury and damage to the substantial rights of this plaintiff. And plaintiff alleges the following errors committed by said county

court touching the vacation of said road, to wit: The court erred in entertaining said road petition; (2) the court erred in overruling said remonstrances; (3) the court erred in appointing viewers and a surveyor to view or survey said road proposed to be vacated; (4) the court erred in confirming and adopting the report of said viewers and in ordering said road to be closed and vacated; (5) the court erred in not dismissing said proceeding for want of jurisdiction."

A writ of review, allowed by the judge of the circuit court for Union County, issued and directed to G. W. Benson, clerk of said county, and served upon T. R. Monk and A. J. Colt, petitioners for the vacation of the road, was returned to the court issuing the same, with a certified copy of the proceedings in question annexed thereto, including the road petition, the descriptive part of which is as follows: "To vacate all that part of a certain public road as follows: Commencing at a point about 50 rods west of the S. E. cor. of Sec. 2, township 1 S., R. 38 E., running thence in a northwest dir. and intersecting a Co. road which runs N. and S. on a $\frac{1}{4}$ Sec. line about 60 rods south of the N. W. cor. of E. $\frac{1}{4}$ of Sec. 2, Town. [here appears the figure 2, over which has been made a figure, and it is difficult to determine whether it was intended for 1 or 7] S., range 38 E., W. M." The notice thereof contains the same description, except that the places of beginning and termination are stated to be in township 7 south. The original petition and notice were sent up with the transcript, and it seems from an inspection of such notice that the copy of the number of the township as "7" is correct, though it may have been intended for "1." Proof of the publication of notice having been made, a remonstrance was filed, but, the persons subscribing their names thereto having failed to state that they were householders, or that they resided in the vicinity of the said road, it was overruled. The plaintiff's counsel having petitioned the county court

for a rehearing, another remonstrance was filed, which was overruled May 10, 1900, and, no order having been made continuing the proceedings, though several terms of the county court intervened prior to March 6, 1901, when said court, upon motion of counsel for petitioners, set aside all orders theretofore made therein, and, an undertaking having been given by the petitioners, viewers were appointed June 5 of that year, to view and report upon the advisability of vacating said road, whereupon another remonstrance was filed July 8, 1901. The persons so appointed not having discharged the duty devolving upon them, the county court, on August 7, 1901, appointed other viewers and a surveyor, who, having viewed and surveyed the road proposed to be vacated, reported in favor thereof September 3, 1901, whereupon plaintiff's counsel again moved the court to dismiss the proceedings, assigning various reasons therefor; but, this motion having been also overruled, an order was made three days thereafter vacating said road, and ordering the report of the viewers and the plat of the surveyor to be recorded. The circuit court, upon its review of these proceedings, held that plaintiff's petition did not state facts sufficient to entitle him to the relief demanded, and dismissed the writ; from which judgment he appeals.

It is contended by plaintiff's counsel that a material variance exists between the description of the road in the petition and that in the notice, by reason whereof the county court never acquired jurisdiction of the subject-matter, and hence the circuit court erred in rendering the judgment complained of. The defendant's counsel maintain, on the other hand, that the petition for the writ of review does not state facts sufficient to entitle plaintiff to the relief demanded, in that it fails to show that he is specially injured, or even affected in any manner, by the vacation of said road; that the writ should have

run to the county court, and not to the county; that said court is vested with authority to vacate a county road without a petition therefor; and that, if a petition was necessary to confer jurisdiction, the one made use of was sufficient for that purpose, and for either of these reasons no error was committed as alleged.

1. Considering, first, in their respective order, the legal propositions insisted upon by defendant's counsel, the statute authorizes any party to a proceeding before an inferior court to have its decision reviewed for errors therein: B. & C. Comp. § 595. A petition addressed to a county court, praying for the location, alteration, or vacation of a county road, performs the office of a complaint, in which the persons thus invoking an exercise of jurisdiction over the subject-matter are in the nature of parties plaintiff, while a remonstrance against the granting thereof is tantamount to an answer, in which the persons so objecting sustain the character of parties defendant. The allegation in the petition that plaintiff was a remonstrator against the vacation of said road, residing in the vicinity thereof, is, in our opinion, sufficient to establish his right to the writ.

2. The statute prescribing the persons to whom the writ of review shall be addressed provides that it shall be directed to the court, officer, or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having custody of its records or proceedings: B. & C. Comp. § 599. The power to locate, alter, or vacate county roads, and also the duty to maintain them when opened, is lodged in and devolves upon the community at large; and its representatives, when duly assembled, may delegate this power to, and impose the corresponding duty that is inseparably connected therewith upon, a public or quasi public corporation which is authorized to exercise the measure of power conferred, and required to

perform the duty enjoined. The legislative assembly of this state has delegated to each county a part of this power by statutes containing the following provisions: All county roads shall be under the supervision of the county court of the county wherein the said road is located: B. & C. Comp. § 4822. The county court has the authority and powers pertaining to county commissioners to transact county business; that is: "(3) To establish, vacate, or alter county roads or highways within the county, or any other necessary act relating thereto, in the manner provided by law": B. & C. Comp. § 912. In cases of injury upon the public highways caused by the negligence of officers whose duty it is to keep up repairs, the party responsible for such injury is the corporation, which has been the recipient of the power delegated and of the duty imposed. In the transaction of county business the county court is an agency of the county that is represented by it, and under the maxim, "*Qui facit per alium facit per se*," the county is the principal that is usually responsible for the acts of its court in all matters pertaining to the highways within its borders, and hence the county is the proper party defendant in proceedings to review the action of such court in laying out, altering, or vacating the highways: *Wood v. Riddle*, 14 Or. 254 (12 Pac. 385); *Oregon & W. Sav. Bank v. Catlin*, 15 Or. 342 (15 Pac. 462).

3. The writ of review may be addressed, however, to the clerk or other person having the custody of the records or proceedings of the court whose decision is sought to be reviewed (B. & C. Comp. § 599), and, as the process in the case at bar was directed to G. W. Benson, the clerk of Union County, whose duty it was to keep the records, files, and other books and papers appertaining to said court (B. & C. Comp. § 1008, subd. 3), the writ was properly addressed.

4. It is argued by defendant's counsel that an abroga-

tion of an existing county road is not an exercise of eminent domain, and, as Section 4782, B. & C. Comp., does not contain the word "vacating," the power of a county court in such cases may be wielded *sua sponte*, and need not be invoked by a petition. The statute to which attention is called is an amendment of section 2 of the act of January 27, 1854 (Stat. Or. 1854-55, p. 486), which was as follows: "All application for laying out, altering or vacating county roads shall be by petition to the board of county commissioners of the proper county, signed by at least twelve householders of the county, residing in the vicinity where said road is to be laid out, altered or vacated, which petition shall specify the place of beginning, the intermediate points, if any, and the place of termination of said road." The amendment was made October 20, 1860, and consisted in changing the words "vacating" to "locating," "vacated" to "located," and "county commissioners" to "county court": Gen. Laws, Or. as compiled by Deady and Lane, p. 721. A further amendment has been made, but the words adverted to remain as thus changed: B. & C. Comp. § 4782. Section 3 of the act of October 20, 1860, in force when the petition to vacate the road in question was presented to the county court, is as follows: "When any petition shall be presented for the action of the county court for laying out, alteration or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding the county court, and also in three public places in the vicinity of said road or proposed road, thirty days previous to the presentation of said petition to the county court, notifying all persons concerned that application will be made to the said county court at their next session for laying out, altering or vacating such road, as the case may be": B. & C. Comp. § 4783. A county court being authorized to vacate a

county road "in the manner provided by law" (B. & C. Comp. § 912), the language thus employed evidences a legislative grant of power for that purpose, and, the statute having prescribed that when any petition shall be presented for the action of the county court for the vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, etc. (B. & C. Comp. § 4783), the manner of executing the power delegated is thus provided by law. Construing these sections *in pari materia* we think it necessarily follows that an application to vacate a county road must be made by petition, but the determination of the question as to whether such petition should specify "the place of beginning, the intermediate points, if any, and the place of termination of said road," as prescribed in Section 4782 B. & C. Comp. is not necessary to a decision herein, nor, if the question were involved, would any conclusion thereon be of any practical value hereafter, because sections 7 and 8 of the act of February 24, 1903, were evidently designed to remove all ambiguity that may have existed in the prior statute: Laws, 1903, pp. 262-264.

5. Having concluded that a petition was necessary to invoke the power of the county court to vacate the road, the remaining question is whether the petition in the case at bar and the notice given by advertisement in pursuance thereof were sufficient to invest the county court with jurisdiction of the subject-matter and of the persons concerned therein. As a preliminary matter, however, it must first be determined whether or not plaintiff's petition states facts sufficient to authorize the review of the decision of the county court for errors therein. The statute provides that a writ of review shall be allowed upon the petition of the plaintiff describing with convenient certainty the decision or determination of the inferior court, officer, or tribunal, and setting forth the errors alleged to have been

committed therein: B. & C. Comp. § 596. A petition for a writ of review must state the facts constituting the alleged erroneous exercise of judicial functions or the employment of excessive jurisdiction with such certainty of detail as to enable the court, from an inspection of the averments, to determine whether an injury or injustice has been done to the petitioner by the decision or determination of which he complains: *Southern Oregon Co. v. Coos County*, 30 Or. 250 (47 Pac. 852); *Cunningham v. Superior Court*, 60 Cal. 576; *Brandon v. Superior Court* (Cal.), 11 Pac. 128; *Mays v. Lewis*, 4 Tex. 1. It will be remembered that the petition for the writ of review in the case at bar assigns in a general way several errors alleged to have been committed by the county court in vacating the road, but such assignments are mere conclusions of law, and insufficient as a basis for affirmative relief: *Southern Oregon Co. v. Coos County*, 30 Or. 250 (47 Pac. 852). The rule here stated is not in conflict with that announced in *Woodruff v. County of Douglas*, 17 Or. 314 (21 Pac. 49), or in *Cameron v. Wasco County*, 27 Or. 318 (41 Pac. 160), which relates to the lack of assignments of error in notices of appeal, though these cases were appeals from judgments involving proceedings to review the orders of county courts. Examining plaintiff's petition for the writ of review in the light which these rules afford, it will be observed that it states that the county road described in the notice posted on the county courthouse and elsewhere was not the same road specified in the petition for the vacation. This, in our opinion, is sufficient averment of a material fact from which the legal conclusion is deduced that the county court erred in not dismissing the proceedings to vacate the road for want of jurisdiction, as stated in the fifth assignment of error. The petition for the writ of review is sufficient to challenge the jurisdiction of the county court in the particular specified.

6. It now becomes necessary to examine the certified copy of the proceedings annexed to the writ. The original petition presented to the county court shows that the place of termination of the road sought to be vacated is either in township 1, 2, or 7 south, while the original notice states such place to be either in township 1 or 7 south. The report of the surveyor appointed to survey the road proposed to be vacated shows that the point of beginning is 8 chains west of the southeast corner of section 2 in township 1 south of range 38 east of the Willamette Meridian, thence running in a northwesterly direction, stating course and distance, and terminating at a point in the center of the county road 12.54 chains south of the quarter post on the north side of said section. A. J. Colt, one of the petitioners for the vacation of the road, on May 10, 1901, gave an undertaking stipulating to pay the costs of the view of the proposed vacation in case the prayer of the petitioners should not be granted, in which the termination of said road is stated to be in township 2 south, and the county court, in its order of June 5th of that year, appointing viewers, recites that the place of termination of the road is in said township. Whether the place of termination in the original notice was intended to be in township 1 or 7 south, it is certain, from an inspection thereof, that it is not located in township 2 south, as stated by Colt in his undertaking, and by the county court in its order. If a petitioner, who was interested in securing a vacation of the road was unable correctly to read the description of the place of termination of the proposed vacation, and the county court, which must have examined the petition, was not more successful in deciphering the manuscript, we think it safe to say that the other parties concerned in the matter could hardly have interpreted the writing, from an inspection thereof, any better. There being a variance between the petition and the notice in the respect men-

tioned, and the statute having required that notice should be given, etc., notifying all persons concerned that an application would be made to the county court at their next session for "vacating such road" (B. & C. Comp. § 4783), meaning the road specified in the petition, no sufficient notice of the petition was given, and hence the county court was without jurisdiction to make the order complained of: *Grady v. Dundon*, 30 Or. 333 (47 Pac. 915). It follows that the judgment of the circuit court is reversed, and the cause remanded, with directions to set aside the proceedings of the county court in the matter of vacating said road.

REVERSED.

Decided 15 June, 1906.

STURGIS v. BAKER.

[72 Pac. 744.]

INDEFINITE COMPLAINT—EFFECT OF ANSWER.

1. Vague and indefinite complaints are sometimes sufficient after answer, though subject to a motion to make more certain. This is such a case: A widow brought an action to recover on a note found among her husband's private papers, but on its face payable to another, alleging that the original payee had transferred the note, and that she was then the owner and holder thereof. The maker answered by denying any knowledge as to her ownership and as to whether the note had been indorsed or transferred to her by the original payee. *Held*, that, while the complaint was uncertain and vague, it was sufficient, after answer, to admit proof of the source and chain of plaintiff's title.

NOTES—CONSTRUCTION OF STIPULATION.

2. An admission that a negotiable instrument was indorsed by the payee thereof to a person other than plaintiff is not an admission that the instrument was indorsed to plaintiff's predecessor in title, the names not being the same.

PLEADING—REAL PARTY IN INTEREST.

3. The defense that a suit is not brought by the real party in interest is proper only where it appears that defendant is cut off from a just offset or counterclaim against plaintiff's demand, and that a judgment in favor of plaintiff will not fully protect defendant when discharged.

COLLECTION OR SALE OF NOTE—INTENT OF PARTIES.

4. Where a note is sent to an agent for collection, and after maturity is paid by the agent, who was not liable thereon, the transaction will be treated, not as a payment, but as a purchase by the agent, if he intended it as such.

From Umatilla: W. R. ELLIS, Judge.

This is an action on a promissory note, by Lina H. Sturgis against William Baker, and is heard on plaintiff's ap-

peal from the judgment at the second trial. The complaint states, in substance, that on the eighth day of December, 1893, the defendant, for value, executed and delivered to the Pendleton Mercantile Company his certain promissory note for the sum of \$139, payable in six months from the date thereof, with interest at ten per cent per annum; "that thereafter the Pendleton Mercantile Company indorsed and transferred the said promissory note, and this plaintiff is now the owner and holder thereof"; that no part of said note has been paid, and there is now due and owing, etc. The answer admits the execution, but denies that said Pendleton Mercantile Company thereafter or at any time "indorsed or transferred said note to plaintiff, or that she is now the owner or holder thereof," and all subsequent allegations of the complaint, and sets up payment in full by defendant to S. P. Sturgis, who claimed to have the note in his possession. When the cause came to trial, defendant's counsel admitted that the note was indorsed by the Mercantile Company to Akin, Selling & Co., and to further sustain her cause plaintiff offered testimony tending to show that it was found among the private papers of S. P. Sturgis, who died in 1896, and with his other assets passed into her possession as his widow and sole legatee, and that it has remained in her possession ever since; that on the thirteenth of December, 1894, Sturgis was the cashier of the First National Bank of Pendleton, and was also loaning money on his own account, discounting notes and doing a general money loaning and brokerage business; that on December 12 the said note was forwarded by Akin, Selling & Co. from Portland to the First National Bank of Pendleton for collection, with the request to send a check for the same; that, on the thirteenth, Sturgis, as cashier, remitted to the company \$153.20 by Portland draft, and that such draft was purchased by Sturgis with his private funds; that on the left-hand corner of the

note, near the bottom, was written in Sturgis' handwriting the figures "386" after the notation "No.," and on the top margin the words and figures "Pd. 13th Dec. 1894, 153.20," and some explanation was attempted to be made of the supposed meaning of these indorsements, in connection with the introduction of some private books and records of Mr. Sturgis, namely, that the figures "386" referred to his private bills receivable number, and the other memorandum indicated that he (Sturgis) paid, on December 13, 1894, \$153.20 for the note.

To further substantiate her cause plaintiff called C. B. Wade, who testified, in substance, that he was assistant cashier of the First National Bank of Pendleton on December 13, 1894; that Sturgis occasionally bought notes and scrip for himself; that it was the custom of Sturgis to put the canceled stamp on all notes paid at the bank, whether belonging thereto or any one else; that he never knew him, as cashier of the bank, to mark a note paid, similar to the mark on the top of this note; that on his own notes he made memoranda on the margin for his own benefit in making up his books, which indicated that he had bought a note on a certain day or had remitted for one at such time, or some transaction of that kind; that he probably put the memoranda there to enable him to enter the proper date in his books, and that when he signed the name "S. P. Sturgis, Cashier," it was usually on account of the bank business. On cross-examination witness testified, over objection, that as assistant cashier he had nothing to do with the note; that he did not know of any authority to sell it, but that it was there, and Akin, Selling & Co. accepted payment on it, and that the bank never purchased it; that Sturgis did not usually use the blank forms of the bank in making remittances on account of his personal business unless it was transacted through the bank; that, if notes came into the bank to sell, he had just as

much right to sell to himself as to any one else; and, on redirect, that he did not know whether the bank purchased the note or not, or whether Sturgis purchased it of the bank; following which, defendant was permitted, over objection, to introduce evidence tending to show that Akin, Selling & Co. did not sell the note to either the First National Bank of Pendleton or Sturgis, and defendant testified in his own behalf that he paid the note to Sturgis. After being instructed, the jury returned a verdict in favor of the defendant, and, judgment being rendered thereon accordingly, the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. James H. Raley*.

For respondent there was a brief and an oral argument by *Mr. Thos. G. Hailey*.

MR. JUSTICE WOLVERTON delivered the opinion.

1. The first assignment of error is based upon the admission, over objection, of the testimony of Mr. Wade on cross-examination, and that of defendant's witnesses, tending to show that Akin, Selling & Co. did not sell the note to either the bank or Sturgis. It is insisted that this testimony tended to show that plaintiff was not the owner or holder of the note in question, but that some other person was, or—what counsel argues is the same thing—that she was not the real party in interest, and that it was incompetent because no such defense had been pleaded. The argument for plaintiff is that she alleged that the note was indorsed to her by the original payee, which was denied, but that at the opening of the case defendant's counsel admitted that it was indorsed by the original payee to Akin, Selling & Co.; that this disposed of the real issue upon the pleadings as to the ownership, and that the allegation that plaintiff is now the owner and holder is but a conclusion of law, and not the allegation of a material fact,

the denial of which put in issue the real ownership, so that defendant was not entitled under the pleadings, after the admission as to the indorsement, to adduce evidence for the purpose of showing that plaintiff was not the owner. The complaint in this particular is a little vague, and the denials are not entirely responsive. The allegations are "that thereafter the Pendleton Mercantile Company indorsed and transferred said promissory note, and this plaintiff is now the owner and holder thereof." The denial is of any knowledge or information as to whether or not "thereafter, at any time, said Pendleton Mercantile Company indorsed or transferred said note to plaintiff, or that she is now the owner or holder thereof." The allegation is not, as seems to have been supposed by the answer, that the mercantile company indorsed the note to plaintiff, but simply that it indorsed and transferred it. Then follows the averment that the plaintiff is the owner and holder thereof. The complaint might have been made more definite and certain in this regard, but it was not, and after answer it was sufficient to let in proof showing the source of plaintiff's acquisition and the manner in which Mr. Sturgis, her predecessor, obtained title from Akin, Selling & Co. She was at liberty to prove, either that she purchased from Akin, Selling & Co. directly, or through the First National Bank of Pendleton, and her evidence had some tendency to establish either of these conditions.

2. The admission that the note was indorsed by the original payee to Akin, Selling & Co. was not intended to be an admission that such company indorsed it to plaintiff's predecessor, because, if such had been the purpose, the incident would have ended the case, as plaintiff's ownership would have thus been established, and that is really the only issue in the case, aside from the one of payment. There was an issue, therefore, as to how plaintiff acquired

title to the note, and she was not precluded to establish the manner of her acquirement thereof by the admission that it was indorsed and transferred by the original payee to Akin, Selling & Co. That issue remained to be established. Was it transferred by Akin, Selling & Co. to plaintiff's predecessor? In this plaintiff had the burden of proof. Now, any testimony tending to show that the note was not transferred to the plaintiff in such manner as to clothe her with the legal or equitable title would be germane to the issue, and would tend to defeat her title, consequently her right to maintain the action. It is sufficient to say of Mr. Wade's testimony, of which complaint is made, that it was the result of an entirely proper cross-examination. The testimony of defendant's witnesses tending to show that Akin, Selling & Co. did not sell the note was a direct contradiction of plaintiff's purchase from that company, either directly or indirectly; hence it was both competent and relevant to dispute her title, so that the court was not in error in permitting the same to go to the jury.

3. The statute requiring that every action shall be prosecuted in the name of the real party in interest (B. & C. Comp. § 27) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. This is the test as to whether such a defense is properly interposed (*Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8), and, while the defense in general bars the action (Pomeroy, Code Rem., 3 ed., § 128), it is special in its nature, and, notwithstanding its interposition, anything that tends to defeat plaintiff's title can be shown under the general issue, ex-

cept in cases where fraud is relied upon for that purpose.

4. The theory of counsel for plaintiff throughout the trial of the cause was that plaintiff's testator purchased the note of Akin, Selling & Co.; that it was sent by them to the bank for collection; and that, instead of collecting from Baker, the bank, as agent of Akin, Selling & Co., disposed of the note to Mr. Sturgis; hence his ownership. As pertinent to this theory of the case, the court charged the jury that the purchase of the note means the making of a contract, whereby the seller agrees to sell, and the buyer to purchase, for a consideration, and that unless they should find that there was a contract or agreement on the part of Akin, Selling & Co., or their agent, to sell the note to some one, their verdict should be for the defendant; and, as cognate to this, the court further charged that, when money is paid on account of a note after its maturity to the payee or his duly authorized agent by a third party not liable upon it, the transaction will be considered a purchase, if the party making the payment intended it to be such; that if, therefore, they should find from the evidence adduced that Mr. Sturgis paid the amount of the note after maturity to the First National Bank of Pendleton, and that, at the time, the bank held the note for collection or sale, and they should further find that Sturgis intended the transaction to be a purchase, then that it was such, and not a payment. Error is assigned because of these instructions. The latter instruction is a modification in phraseology, but not in any essential degree, of one asked by plaintiff, so that she ought not to be found taking an exception thereto. But, however that may be, it is impossible to imagine how a purchase could be made of a note without a seller and a buyer, a consideration, and an agreement to effect a transfer. The plaintiff does not claim title by gift. It must then be by purchase, and it can only be accomplished through

agreement. This may, however, be express or implied. The former instruction pertains more directly to an express, and the latter to an implied, agreement of the kind, and, as applicable to the case at bar, we think the instructions are correct. In *Dodge v. Freedman's Sav. & T. Co.* 93 U. S. 379, it is held that in law a collecting bank is the agent of the holder of the note, and that where the intention to continue the existence of the note, and not to cancel it by the payment, is made evident when the money is paid to the collecting agent, and the owner of the note receives the amount due him, the transaction is treated and sustained as a purchase. These considerations dispose of all the contentions of counsel, and, finding no error, the judgment is affirmed. AFFIRMED.

Decided 22 June, rehearing denied 3 August, 1903.

MOORE v. HALLIDAY.

[72 Pac. 801.]

INJUNCTION AGAINST TRESPASS*—NECESSITY OF IRREPARABLE INJURY.

1. Equity will not enjoin the continuance of a trespass on realty unless the acts committed amount to an irreparable injury to the estate: for example, opening an inclosure and cutting crops and shrubbery growing thereon, and turning cattle therein, under a claim of right so to do, is not a destruction of the body of the estate, and an injunction will not lie against the trespasser: *Mendenhall v. Harrisburg Water Co.* 27 Or. 38, *Allen v. Dunlap*, 24 Or. 229, and *Muldrick v. Brown*, 37 Or. 185, distinguished.

* NOTE.—Previous Oregon cases on the subject of an injunction against a trespass are *Rwing v. Rourke*, 14 Or. 514 (where the trespass had been completed, and no continuance was threatened); *Allen v. Dunlap*, 24 Or. 229 (where actual waste had been committed, and further injury threatened); *Mendenhall v. Harrisburg Water Co.* 27 Or. 38 (where waste was being committed by cutting timber and digging a canal); *Bishop v. Bataley*, 28 Or. 119 (where ores were being extracted from a mine); *Muldrick v. Brown*, 37 Or. 185 (where a carrying away of ores was threatened); *Parker v. Furlong*, 37 Or. 248 (where a single, naked trespass had already been committed, not irreparable in character); *Union Power Co. v. Lichty*, 42 Or. 503 (where defendant had threatened to build up a dam and suddenly release large volumes of water on plaintiff's land further down stream). These are all cases where a distinct trespass was being committed, or was threatened, by some person out of possession on property of which plaintiff had possession. In this connection two Oregon cases may be cited holding that equity will not enjoin a trespass by one claiming merely the right to pass through an inclosure where he claims

43	243
45	131

INJUNCTION AGAINST TRESPASS—INSOLVENCY OF TRESPASSER.†

2. The mere insolvency of a trespasser does not warrant an injunction against his trespassing.

PLEADING—FAILURE TO STATE CAUSE OF ACTION—DEMURRER.

3. Under B. & C. Comp. § 72, providing that, if no objection be taken by demurrer or answer, defendant shall be deemed to have waived the same, excepting the objection that the complaint does not state facts sufficient to constitute a cause of action, a failure to demur to a count of a complaint on the ground that it does not state facts sufficient to constitute a cause of action is not a waiver of the objection.

PLEADING—STATEMENT OF SEPARATE CAUSES OF ACTION.

4. The material matter of each separate cause of suit or action stated in a pleading must be complete within itself.

INJUNCTION—INCOMPLETE TITLE TO PUBLIC LAND—POSSESSION.

5. A qualified settler on public land, who is in possession but whose title is yet uncompleted, cannot maintain a suit to quiet title thereto: *Kitcherside v. Myers*, 10 Or. 21; *Jackson v. Jackson*, 17 Or. 110; *Pacific Livestock Co. v. Gentry*, 38 Or. 275, distinguished.

From Malheur: MORTON D. CLIFFORD, Judge.

Suit by I. H. Moore against T. W. Halliday, administrator. From a decree for defendant, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *William Miller* and *John L. Rand*, with an oral argument by *Mr. Rand*.

For respondent there was a brief and an oral argument by *Mr. Will R. King*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

there is a county road, for in such cases the injured party has an adequate remedy at law: *Smith v. Gardner*, 12 Or. 221; *Thomas v. Taylor*, 42 Or. 576.

There is another class of cases in which defendants in possession were destroying the substance of the estates, without authority, and were enjoined. Such cases are *Sheridan v. McMullen*, 12 Or. 150 (where a tenant was destroying a grove of specially reserved and peculiarly valuable trees); and *Elliott v. Boyd*, 40 Or. 328 (where a tenant was acting in collusion with another to remove a prohibited class of trees from the leased premises).

A somewhat similar line of cases holds that where qualified settlers on public land, the title to which is still in the government, have been forcibly interfered with by mere trespassers, injunctions may issue to protect the possession of the settler. Such cases are *Kitcherside v. Myers*, 10 Or. 21; *Ewing v. Rourke*, 14 Or. 514 (*arguendo*); *Jackson v. Jackson*, 17 Or. 110; *Hindman v. Rizer* (*arguendo*), 21 Or. at pp. 116, 117; *Allen v. Dunlap*, 24 Or. 229; *Bishop v. Baisley*, 28 Or. 119; *Muldrick v. Brown*, 37 Or. 185; *Browning v. Lewis*, 39 Or. 11.—REPORTER.

†NOTE.—To the same point see *Parker v. Furlong*, 37 Or. 248.—REPORTER.

This is a suit to quiet the title to certain real property, and to enjoin a threatened continuance of trespasses thereon. It is alleged in the complaint, in substance, that on July 5, 1902, plaintiff, having made a homestead entry upon one hundred and sixty acres of land (particularly describing it) in Malheur County, Oregon, thereafter, and prior to September 26, 1902, when this suit was begun, established his residence thereon, entered into full possession, and is now the owner in fee thereof, subject to the paramount title of the United States; that defendant, as the administrator of the estate of J. H. Chandler, deceased, unlawfully claims an interest therein, asserting that such estate is the owner in fee of said premises, but that defendant has no right thereto, nor any title or interest therein, nor is he in the actual possession thereof. For a second cause of suit, plaintiff, after alleging that he made a homestead filing upon said land, and is in the sole possession thereof, as hereinbefore stated, avers that, without his consent, defendant, at divers times, too numerous to mention, opened the inclosure surrounding said premises, cut and removed hay and grain therefrom, turned cattle and horses thereon, and, claiming the right at all times so to do, threatens to continue such acts, against plaintiff's protest; that his conduct in this respect has caused, and, unless restrained, will result in, the destruction of the crops and shrubbery, to the irreparable injury and damage of said land; that defendant is impecunious and unable to respond in damages; and that plaintiff has no plain, speedy, or adequate remedy at law. A demurrer to the complaint, interposed on the ground that the two causes of suit were improperly joined, and that the second cause did not state facts sufficient to warrant injunctive relief, having been sustained, and plaintiff declining to amend or further plead, the suit was dismissed, and he appeals.

It is contended by plaintiff's counsel that the causes of

suit set forth in the complaint arose out of the same transaction, and were therefore properly joined, and that if the second cause failed to state facts sufficient to entitle their client to the relief prayed for, and was for that reason demurrable, only one cause was stated, and, this being so, the court erred in dismissing the suit.

Considering the second cause of suit, the question to be determined is whether a court of equity should enjoin a threatened commission of the acts complained of, upon the facts stated. The jurisdiction of a court of equity to restrain trespasses on real property is undoubtedly an outgrowth of its interference to prevent waste. At common law, waste, when threatened by a tenant in dower, or by the curtesy, or guardian in chivalry, was prevented by a writ of prohibition issued by a court of chancery, which, if unavailing, was followed by an original writ, emanating from the same source, and made returnable, usually, in the court of common pleas. Upon the appearance of the defendant, and after issue joined, he was tried, and, if found guilty, the plaintiff recovered single damages for the waste committed. Though the writ of prohibition at common law was limited to the class of tenants mentioned, it was afterwards extended to other persons by statute, in speaking of which, Lord Chief Justice EYRE, in *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 105, says: "That which these statutes gave by way of remedy was not so properly the introduction of a new law, as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that which gave a writ of waste or estrepement pending the suit. It follows, of course, that this was a judicial writ, and was to issue out of the courts of common law; but, except for the purpose of staying proceedings pending a suit, there is no intimation in any of our

text writers that any prohibition could issue from those courts." The method thus adopted to prevent the spoil or destruction of lands, houses, gardens, trees, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder (2 Bl. Com. 281), proving cumbersome, equity intervened, and by injunction prevented the commission of waste; the jurisdiction being founded upon the necessity of preventing irremediable injury, and allowable only in cases where a privity of title existed between the parties: 1 High, Inj. (3 ed.) § 697; *Bolster v. Catterlin*, 10 Ind. 117; *Wiggins v. Williams*, 36 Fla. 637 (18 South. 859, 30 L. R. A. 754). The commission of waste having been so successfully thwarted in these cases by the intervention of a court of equity, its jurisdiction was soon thereafter invoked to prevent injuries to real property by persons having no privity of title; the tort being denominated a "trespass": *Mitchell v. Dors*, 6 Ves. Jr. 147. The relief by injunction in such cases has been sparingly granted, and, when bestowed, is based upon the theory of irreparable injury, resulting from the peculiar character of the property affected thereby, from the frequency of the acts complained of, amounting to a continuing trespass, or from the insolvency of the tortfeasor, so that an action at law for the recovery of damages would be inadequate, thereby justifying a resort to a court of equity: 2 Story, Eq. Jur. (13 ed.) § 928; *Smith v. Gardner*, 12 Or. 221 (6 Pac. 771, 53 Am. Rep. 342); *Mendenhall v. Harrisburg Water Co.* 27 Or. 38 (39 Pac. 399); *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10); *City of Council Bluffs v. Stewart*, 51 Iowa, 385 (1 N. W. 628); *Roebeling v. First Nat. Bank (D. C.)*, 30 Fed. 744; *Carney v. Hadley*, 32 Fla. 344 (14 South. 4, 22 L. R. A. 233, 37 Am. St. Rep. 101).

1. An injunction has been issued in this state to prevent the cutting of timber (*Kitcherside v. Myers*, 10 Or.

21; *Mendenhall v. Harrisburg Water Co.* 27 Or. 38, 39 Pac. 399), and the removal of ore (*Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428), but in each instance the right to the relief granted was based upon the destruction of the estate. In *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675), Mr. Chief Justice LORD, in speaking of equitable interference to prevent the commission of trespass to real property, says: "The general rule that a court of equity will refuse to take jurisdiction and award even a temporary injunction in cases of mere trespass is conceded; but there is an established exception in cases of mines, timber and the like, in which an injunction will be granted to restrain the commission of acts by which the substance of an estate is injured, destroyed, or carried away. In such case, the injury being irreparable, or difficult of ascertainment in damages, the remedy at law is inadequate." It is difficult to understand how the opening of plaintiff's inclosure, cutting and removing hay and grain therefrom, or turning cattle and horses therein, can ever amount to a destruction of the substance of the estate. The opening of the inclosure may have been accomplished by a mere removal of bars or the unfastening of a gate, that would not amount to a permanent injury to the fence, conceding that to be a part of the realty. The hay and grain grown upon the premises are crops, the removal of which does not constitute such an injury as cannot be adequately compensated in damages; nor can the cutting of these annual products seriously affect the land, for, if they were not severed, they would inevitably decay during the winter, and, though their destruction by the elements might enrich the soil, by giving back to it some of the ingredients extracted by their growth, resulting in a potential benefit, the cutting of such crops cannot be a very serious injury to the land. In the absence of an

averment in the complaint that the animals turned upon the premises destroyed its substance by so trampling the soil as to damage it irremediably, it must be inferred that the only injury sustained was the eating of the grass, which, like the removal of the hay and grain, is not irreparable. It will be remembered that the complaint states that, unless defendant is enjoined from executing his threat to continue the acts complained of, the shrubbery on the land will be destroyed. There is no allegation in the complaint that any shrubbery is growing on the premises, unless the legal conclusion to that effect may be considered as such; but since the character of the shrubbery is not specified, and may consist of sage brush, its destruction does not necessarily imply an irreparable injury to the estate, thus showing that the acts complained of constitute only mere trespasses.

2. The only averment, therefore, that tends in any manner to authorize the intervention of a court of equity to restrain the threatened commission of trespasses that would not be attended with irreparable injury is the alleged insolvency of the defendant, and it remains to be seen whether this is sufficient for that purpose. In *Centreville & A. Turnpike Co. v. Barnett*, 2 Ind. 536, the acts complained of were mere trespasses, not constituting irreparable injury, and the only averment upon which equitable interference could be based was the alleged insolvency of the defendant; and it was held that this was insufficient, the court saying: "The fact that a trespasser is insolvent will not give chancery jurisdiction to enjoin his acts, where the other circumstances of the case preclude it." In *Mechanics' Foundry v. Ryall*, 75 Cal. 601 (17 Pac. 703), a suit having been instituted to restrain the threatened continuance of certain acts that did not result in irreparable injury, it was held that, under the circumstances, an allegation of the defendant's insolvency did not warrant an exercise of injunctive

relief, the court saying: "Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent. Other facts and circumstances must be shown before the extraordinary remedy of injunction can be invoked." In the case at bar, no other facts having been alleged, and as in cases of this character an injunction is sparingly granted (*Smith v. Gardner*, 12 Or. 211, 53 Am. Rep. 342, 6 Pac. 771), we think the second cause of suit set up in the complaint does not state facts sufficient to warrant the exercise of equitable interference, and for this reason no error was committed by the court below in sustaining the demurrer thereto interposed on that ground.

3. The first cause of suit was not challenged by the demurrer, except for misjoinder; but, if this part of the complaint does not state facts sufficient to constitute a cause of suit, the failure in that respect is not waived, and the want of necessary averment may be insisted upon in this court to defeat plaintiff's right: B. & C. Comp. § 72; *Evarts v. Steger*, 5 Or. 147.

4. It will be remembered that the complaint states that on July 5, 1902, plaintiff, having made a homestead entry upon the land in question, thereafter, and prior to September 26, 1902, established his residence thereon, entered into full possession, and, subject to the paramount title of the United States, is the owner in fee thereof; that defendant unlawfully claims an interest therein, but that he has no such right, title, or interest, nor is he in the actual possession thereof. The plaintiff not having made his homestead entry upon the land until July 5, 1902, could not have commuted his filing or made final proof in support of his entry September 26th of that year; and hence he was not the owner in fee of the land, as alleged, but had an inchoate right thereto, that might ripen into a title, if he complied with the requirements prescribed by the laws of the United States in respect to settlement, cultivation,

and proof thereof, within the time allowed. The material matter of each separate cause of suit stated in a pleading must be complete within itself: 5 Ency. Pl. & Pr. 320; *Gardner v. McWilliams*, 42 Or. 14 (69 Pac. 915).

5. This being so, the plaintiff's right to the premises being incomplete, but his possession undisturbed, will a court of equity, when the title is in the United States, compel the defendant to set up his claim to the land, that it may be decreed invalid? In *Kitcherside v. Myers*, 10 Or. 21, it was held that where a tract of public land is subject to be taken under the homestead acts, and a party has taken the initial steps to homestead it, he has a right to the possession thereof for the purpose of doing the required acts to secure his title, and, if he is prevented from taking possession by one without legal title or equal equitable claim, he may ask a court of equity to put him in possession of his rights. Mr. Chief Justice LORD, speaking for the court, in deciding the case, says: "In 1878 the plaintiff, after filing the necessary affidavits and paying the requisite fee, received his certificate therefor, and entered upon the tract of land described in the complaint as a homestead, the east half of which is the land in dispute, and in the actual possession of the defendant, and proceeded to do the necessary acts of residence and cultivation in order to comply with the terms of the homestead acts, and to perfect his title to the land. But it is clear from the evidence that the defendant was, and now is, in the actual possession of the east half of the whole tract which the plaintiff has taken as a homestead, and that he prevented and forcibly resisted the plaintiff from taking possession of the land in controversy, and was cutting down the timber, to the irreparable injury of the rights of the plaintiff in the same. It appears, then, that the plaintiff has never had possession of the land in question, although it is included in his entry, and so stated in the

certificate of the officer of the land office, and that the legal title as to the plaintiff is in the United States. So, as to both of these parties the legal title to the land in controversy is in the United States, and whatever right either party has to the land, not being legal, must be equitable, if anything, and the question to be decided must necessarily be, who has the superior equity, or the better right to the possession of the land?"

In *Jackson v. Jackson*, 17 Or. 110 (19 Pac. 847), the plaintiff having filed a preëmption declaratory statement, claiming certain land under the land laws of the United States, was prevented by the defendant from taking possession of a part of the premises, and, in a suit to enjoin such interference, it was held that a court of equity would protect the plaintiff's right of possession so long as his entry remained uncanceled. The principle thus established has been followed, and parties entitled to the possession of land, the title to which is in the United States, have been protected therein, when their right thereto has been disturbed, in the following cases: *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675); *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936); *Muldrick v. Brown*, 37 Or. 185 (61 Pac. 428). In each of these cases, however, the equitable intervention was based upon the defendant's interference with the plaintiff's right to possession, and, as the title to the land was in the United States, the court did not attempt to quiet it, but only to determine who had the superior right of possession. When the successful party in a contest before the local land officers for a tract of land belonging to the United States is permitted to make an entry or to file thereon, and receives a certificate evidencing his right to the possession thereof, a state court, upon proper allegation and proof, will restrain the defeated party from disturbing such possession while the certificate remains uncanceled, upon the theory that an inchoate right to the land is in-

itiated which will be protected by invoking the maxim that equity will not suffer a wrong without a remedy: *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597). But if, after such certificate has been issued, the defeated party is to be enjoined from asserting any claim to the land, it would seem necessarily to follow, if the decree is of any binding force, that he would be deprived of his right of appeal from the action of the officers issuing such certificate to their superior officers in the land department of the general government. Until the title to public land has passed from the United States, as evidenced by a patent or by a grant *in presenti*, all questions affecting such title must be tried in the federal courts: *Wilcox v. McConnell*, 38 U. S. (13 Pet.) 498. In the case at bar it is apparent from an inspection of the complaint that the title to the land embraced in plaintiff's homestead entry had not passed to him, and for this reason the first cause of suit did not state facts sufficient to authorize the court to quiet such title; and, as the plaintiff's possession is not alleged to have been disturbed in that cause of suit, the defendant cannot be enjoined as an incident to the relief sought.

Neither cause of suit having stated facts sufficient to entitle plaintiff to equitable intervention, it is unnecessary to consider the question of joinder, and hence the decree is affirmed.

AFFIRMED.

Decided 22 June, 1908.

WALLOWA COUNTY v. WADE.

[72 Pac. 798.]

ACCEPTANCE OF EASEMENT GRANTED BY CONGRESS FOR HIGHWAYS.

1. The continuous use of a road over unoccupied government land by the public for twenty years, during thirteen years of which the road has been located by a court proceeding, and marked by the public surveyor, amounts to an acceptance of the easement granted by the act of Congress of July 26, 1866 (Rev. Stat. U. S. § 2477) for the construction of highways over government lands not reserved for public use.

HIGHWAYS OVER PUBLIC LAND—RIGHTS OF SUBSEQUENT PURCHASER.

2. After the right to use certain government land for a public highway has become fixed, one subsequently acquiring title thereto takes subject to such easement.

HIGHWAYS BY PRESCRIPTION OVER STATE LAND.

3. Continuous use by the public as a highway of a strip of state land for more than twenty years, during the ownership of the state, establishes a public easement by prescription over such land for highway purposes.

From Wallowa: ROBERT EAKIN, Judge.

Suit by Wallowa County against Aaron Wade to stop the obstructing of a public highway, resulting in a decree as prayed for, from which defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *J. D. Slater* and *John S. Hodgins*, with an oral argument by *Mr. Slater*.

For respondent there was a brief over the names of *Samuel White*, District Attorney, and *Daniel W. Sheahan*, with an oral argument by *Mr. Andrew M. Crawford*, Attorney-General, and *Mr. Sheahan*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to enjoin the defendant from obstructing a public highway running through sections 24, 25, and 36 in township 1 south of range 44 east of the Willamette Meridian, in Wallowa County. All of sections 24 and 25, except one forty-acre tract, was unoccupied public land of the United States until 1901, when it was settled upon under the homestead law. The forty-acre tract was taken as a homestead in 1896. Section 36 was school land, belonging to the state, until January, 1901, when the defendant contracted for its purchase. The road in question is a part of a highway from the Town of Joseph, in the southern part of the county, leading north a distance of about twenty-four miles by and near the Town of Enterprise, and was traveled by the public as early as 1880. In 1888, upon a petition of the requisite number of householders, and after notice thereof, the county court appointed view-

ers and a surveyor to lay out and locate a county road along the same route, who thereupon proceeded to lay out, survey, and locate the road, from the Town of Joseph north, following as near as they could the then traveled road. Upon the coming in of their report, it was approved by the county court, and the road established and ordered opened. From that time the use by the public of that part of the road now in controversy was continuous and uninterrupted until 1901, when the defendant, by permission of the homestead claimants, built a fence across it near the south line of section 24, and another through the center of section 36. The purpose of this suit is to enjoin the maintenance of such fences, and, the decree of the trial court being in favor of the plaintiff, defendant appeals.

That the road was used continuously by the public as a highway for more than ten years prior to the construction of the fence by the defendant is clearly shown by the testimony. S. A. Hart, who has lived near the north end of the road since 1883, and was one of the chain carriers at the time it was surveyed, in 1888, says that it was in use by the public as a road when he first knew it, and has been continuously used ever since; that he and the settlers in that portion of the county have used it since 1888, supposing it to be a public highway by reason of the action of the county court; that over sections 24, 25, and 36 the travel has held to the old, original track, although there has been some slight variation; that during all this time it has been a plain, open, well-beaten track, and has been traveled by all the people that live in that section of the county; that it is the only road used by them in going to and returning from the county seat; that through sections 24, 25, and 36 the road passes through a cañon or gulch, and there is practically but one track. George S. Craig has lived in the county for twenty years, and has known the road during that time. He testifies that it has

been traveled by the public continuously as a highway, and he supposed that it was a county road since 1888; that through sections 24, 25, and 36 the road runs through a cañon, and there has been but one track or roadbed used by the public, and witness never noticed that it had been changed. J. B. Olmsted and others, who have known and used the road since 1883 and prior to that time, testify substantially to the same state of facts. Indeed, upon this question there is practically no controversy in the testimony. That of the defendant was directed mainly to showing that the road over the land inclosed by him had never been worked or improved by the county authorities, or under their direction, and that it had been obstructed or changed from the original survey at other places along the route. The position of the plaintiff is that, at the time the road in controversy was obstructed by the defendant, it was a public highway, and had become such by (1) establishment under the statutory proceedings; (2) dedication and acceptance; and (3) prescription and user. The objection of the defendant to the statutory proceedings is that the petition upon which they were based was insufficient to give the court jurisdiction, because it did not sufficiently describe the beginning, intermediate, or terminal points of the proposed highway. This question we shall not now stop to examine.

1. The county court, acting upon such petition and a notice given as required by law, caused the road to be surveyed and marked out upon the ground, and this was followed by continuous user by the public for more than thirteen years prior to the construction of the fence by the defendant. This is sufficient to amount to an acceptance of the grant made by Congress, and for the establishment of a highway over state land, either by dedication or prescription: *Bayard v. Standard Oil Co.* 38 Or. 438 (63 Pac. 614); *Nosler v. Coos Bay R. Co.* 39 Or. 331 (22 Am. & Eng.

R. Cas. 720, 64 Pac. 644). In 1866, Congress passed an act (Act July 26, 1866, c. 262, § 8, 14 Stat. U. S. 253) providing that "the right of way for the construction of highways over public lands not reserved for public use is hereby granted": Rev. Stat. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567). While the language of this act is somewhat indefinite and uncertain, it has usually been construed as a present grant of an easement over public lands for highways, and that it is not confined to technical public highways, but is applicable to railways and toll roads: *Flint & P. M. Ry. Co. v. Gordon*, 41 Mich. 420 (2 N. W. 648); *Wason Toll Road Co. v. Townsite of Creede*, 21 Land Dec. Dep. Int. 349, 351; *Pasadena Toll Road Co. v. Schneider*, 31 Land Dec. Dep. Int. 405. "The object of the grant," say the Supreme Court of South Dakota, "was to enable the citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highways and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it": *Wells v. Pennington County*, 2 S. D. 1 (48 N. W. 305, 39 Am. St. Rep. 758). The act of Congress is more than a mere general offer to the public, being in effect a dedication of the land, which becomes operative and relates back to the date of the act whenever the public, either by user or by some appropriate act of the highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway. The right is necessarily indefinite, and, in a sense, floating and liable to be extinguished by a sale or disposition of the land

until the highway is surveyed and marked on the ground, or in some other way identified or designated; but when the public authorities lay out and locate a road over public land of the United States by surveying and marking it on the ground, or by some legislative act, or when it is shown by user, the right becomes complete, and an intention to accept the dedication is manifested, and subsequent settlers on the land take subject to the easement. The next year after the act of Congress referred to, the legislature of Kansas passed an act declaring all section lines in a certain county to be highways; and it was held that it amounted to an acceptance of the dedication by Congress, and that when the land passed into private ownership it was taken subject to the easement: *Tholl v. Koles*, 65 Kan. 802 (70 Pac. 881). To the same effect is *Wells v. Pennington County*, 2 S. D. 1 (39 Am. St. Rep. 758, 48 N. W. 305).

2. In *Streeter v. Stalnaker*, 61 Neb. 205 (85 N. W. 47), it was held that long-continued user by the public, together with a survey, marking out, platting, and improvement by public authorities, was sufficient to show an acceptance of the dedication. In that case it is said: "By this act the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established." In *McRose v. Bottyer*, 81 Cal. 122 (22 Pac. 393), there was no action whatever by the public authorities, and nothing shown but user by the public. The court held that sufficient, saying: "The fact that the land was public land of the United States at the time the right to use it as a public way was acquired, and also at the time the use of it ceased, makes no difference. The act of Congress of 1866 (Section 2477, Rev. Stat. U. S., U. S. Comp.

St. 1901, p. 1567,) granted the right of way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made, the public acquired an easement subject to the laws of this state; and the easement not having been extinguished by the operation of such laws, when the defendant acquired the title to the land, she took it subject to the easement." In *Smith v. Mitchell*, 21 Wash. 537 (58 Pac. 668, 75 Am. St. Rep. 858), the same doctrine is announced; the court holding that a highway may be established over public land in any of the ways recognized by the laws of the state. In deciding the case, Mr. Chief Justice GORDON, speaking for the court, said: "It is a well known fact that many of the public highways in this state had their inception in adverse user, which ripened into prescription. The act of Congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by prescription, dedication, user, or proceedings under the statute. Any other conclusion would occasion serious public inconvenience." We take it, therefore, that the long-continued user by the public shown by the testimony in this case, together with the action of the county authorities in surveying and locating a road over and through sections 24 and 25, was, under the construction thus given to the act of Congress, an acceptance of the dedication, and sufficient proof of a public highway.

3. Section 36 was school land, and belonged to the state until 1901. Prior to the act of February 10, 1903 (Laws,

1903, p. 18), the statute of limitation ran against the state the same as against a private individual, and its title to school land could be extinguished by adverse possession: B. & C. Comp. §§ 4, 13; *Ambrose v. Huntington*, 34 Or. 484 (56 Pac. 513); *Schneider v. Hutchinson*, 35 Or. 253 (57 Pac. 324, 76 Am. St. Rep. 474). The proof shows abundantly that the road had been used continuously through this section for more than twenty years by the public as a highway, under a claim of right, prior to the acquisition of the land by the defendant; and this was sufficient to establish the highway, as against the state, by prescription or adverse user (Elliott, *Roads & Sts.*, 2 ed., § 175), even if the surveying, locating, and filing the plat thereof was not of itself a dedication of the land to the public for a highway, if followed by user by the public for that purpose: *Hanlin v. Chicago & N. W. Ry. Co.* 61 Wis. 515, 526 (21 N. W. 623). The county is an agency of the state in the location of highways, and there is reason for the position that the act is binding on its principal, even if not valid as against a private individual because of irregularities or imperfections. But a decision of the question is not necessary at the present time. The decree of the court below is affirmed.

AFFIRMED.

Decided 16 March, rehearing denied 8 August, 1908.

McLEOD v. LLOYD.

[71 Pac. 795, 74 Pac. 491.]

PLEADING — REFERENCE TO EXHIBITS.

1. An allegation in a pleading that the pleader is the owner of certain real property, "as is shown by the abstract of title hereto attached and made part hereof," an abstract being actually fastened to the pleading and identified, is not a reference to the abstract, but amounts to a plea that the title was derived from and through the persons named therein.

PRESUMPTION AS TO SEALS ON DEEDS.

2. Under B. & C. Comp. § 5333, enacting that a conveyance of an interest in land may be made by "deed, signed and sealed" by the grantor, conveyances referred to in an abstract of title as "deeds" are presumed to have been sealed as required by statute.

43	260
45	69
43	260
46	178n

PATENTS—PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.

3. Under B. & C. Comp. § 788, subd. 15, creating a presumption that official duty has been regularly performed, it will be assumed that a patent referred to as having been recorded in the county deed records was executed by the government officials with all the formalities required by law: as, for example, B. & C. Comp. § 788, subd. 15, enacts that it is to be presumed that official duty has been regularly performed, and Rev. Stat. U. S. § 458 (U. S. Comp. St. 1901, p. 250), enacts that all patents issuing from the General Land Office shall be issued in the name of the United States, signed by the President and countersigned by the Recorder of the General Land Office. *Held*, that where an abstract of title shows a patent, though it does not show it countersigned by the Recorder, it will be presumed that it was so countersigned.

SUIT TO REMOVE A CLOUD—PLEADING IMPERFECTIONS.

4. In a suit to remove a cloud an allegation that defendant claims some interest or right of title to the specified property, as shown by an abstract of title attached to the complaint, is a sufficient specification of the particular record constituting the cloud and of the infirmity rendering it void, where the abstract shows that the deeds to defendant were executed by plaintiff's grantor after plaintiff's deeds had been regularly executed and recorded.

REMOVING CLOUD—ALLEGING OWNERSHIP—REMEDY AT LAW.

5. In a suit to remove a cloud from title an allegation that the property was "unseated, unimproved, and unoccupied" is a sufficient statement that defendant was neither in possession nor acting as the owner thereof, within the meaning of B. & C. Comp. § 828.

REMOVING CLOUD—CONSTITUTIONAL RIGHT TO JURY TRIAL.*

6. Section 516, B. & C. Comp., giving to any person claiming an interest in realty not in the possession of another a right to sue in equity to determine the respective claims, does not violate Const. Or. Art. I, § 17, preserving the right of trial by jury in civil cases, for this is only the right as it existed at common law, which applied solely to cases where the defendant had possession.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF.

7. In cases to remove a cloud from title where it is claimed that one of the parties holds under fraudulent deeds, the burden of proof is on the party claiming the fraud to both allege and prove it, even though his title is based on deeds that are *prima facie* voluntary.

REMOVING CLOUD—FRAUD, ACCIDENT OR MISTAKE—EQUITY.

8. In a suit to remove a cloud, where plaintiff claims under a quitclaim deed from persons never in possession, and defendant claims under a warranty deed for full value from the same grantor, equity has jurisdiction to determine the conflicting rights without any other basis than the opposition of the respective claims.

QUITCLAIM DEED AS BASIS OF TITLE.

9. The fact that the plaintiff secured a quitclaim deed immediately before instituting a suit to quiet title does not effect his right to maintain the suit.

REAL PARTY IN INTEREST—SUIT BY AGENT.

10. The holder of the legal title to real property may maintain a suit to remove a cloud from the title, though he holds in trust for an undisclosed principal, since such an agent may sue in his own name.

* NOTE.—As to the right of trial by jury preserved by Const. Or. Art. I, § 17, see *Tribou v. Stroubridge*, 7 Or. 156; *McDonald v. American Mort. Co.* 17 Or. 628; *Fleischer v. Citizens' Invest. Co.* 25 Or. 119; *Raymond v. Flavel*, 27 Or. 219; *Trummer v. Konrad*, 32 Or. 84; *Mitchell v. Oregon Flax Assoc.* 38 Or. 503; *Salem Traction Co. v. Anson*, 41 Or. 502.—REPORTER.

PRIORITY OF RECORDED CONVEYANCES.

11. Under B. & C. Comp. § 5350, providing that every conveyance of real property not recorded in five days shall be void as against subsequent purchasers in good faith whose conveyance shall be first duly recorded, where neither of two conveyances is recorded within the time limited, the one first recorded takes precedence over the other.

PRACTICE IN SUPREME COURT—AFFIRMANCE OF DECREE ON DEMURRER.

12. Where a final decree has been entered on the decision of a demurrer to a complaint, and such final order is affirmed, it is discretionary with the supreme court to enter a final decree or to remand the case for such further proceedings as the trial court may deem proper.

AMENDING PLEADINGS AFTER CAUSE HAS BEEN REMANDED.

13. When an equity cause has been remanded to the trial court after affirmance of a decree entered upon the decision of a demurrer to a complaint, it devolves upon such lower court to determine whether the defeated party may plead further.

From Lane: JAMES W. HAMILTON, Judge.

This is a suit by G. B. McLeod against Clyde D. Lloyd to remove an alleged cloud upon the title to real property. It is averred in the complaint, in substance, that plaintiff is the absolute and unqualified owner of the southwest quarter, section 12, northeast quarter, the east half southeast quarter, the southeast quarter northwest quarter, and the northwest quarter southeast quarter, section 14, township 24 south, range 1 east of the Willamette Meridian, containing 480 acres, more or less, "as is shown by the abstract of title hereto attached, marked Exhibit A and made a part hereof;" "that said lands are all unseated, unimproved, and unoccupied, and not in the actual possession of any person;" that defendant claims some interest, right of title thereto, which claim is unfounded, illegal, unjust, and contrary to law and to equity, "as is shown by the said Exhibit A; but that the pretended deeds noted and set out at Nos. 3, 7, and 10 of said Exhibit A, and the said claim of defendant, have created and constitute a cloud upon plaintiff's title to said lands, although null and void both in law and equity; and that defendant refuses to relinquish such claim, though requested so to do;" "that plaintiff has no plain, speedy, adequate, or any remedy at law." The complaint is verified by plaintiff's

attorney, and his affidavit, in addition to the statutory requirement, is to the effect that he had personally examined the records of Lane County, and compared therewith the abstract of title attached to the complaint, and that said abridgment is a true, full, correct, and complete abstract of title to all of said lands. The abstract of title, or Exhibit A, omitting therefrom the reservations in the United States patents of vested and accrued water rights, etc., is as follows :

“EXHIBIT A.

Abstract of title to the following described real estate, situate in Lane County, Oregon :

The southwest quarter of section No. 12, the northeast quarter, the east half of the southeast quarter, the northwest quarter of the southeast quarter, and southeast quarter of northwest quarter of section No. 14, township No. 24 south, range 1 east of Willamette Meridian, containing 480 acres.

NO. 1. PATENT.

<i>Grantor</i> —The United States, by T. Roosevelt, President.	Consideration, homestead. Date, November 29, 1901.
F. M. McKean, Secretary.	Recorded February 10, 1902.
<i>Grantee</i> —William H. Watkins.	Book 52, page 76.

Description—Southwest quarter of section 12, in township 24 south of range 1 east of Willamette Meridian, in Oregon, containing 160 acres.

NO. 2. WARRANTY DEED.

<i>Grantor</i> —William H. Watkins (unmarried).	Consideration, \$1.00. Date, July 31, 1901.
	Recorded September 21, 1901.
<i>Grantee</i> —Mrs. Emma L. Watson.	Book 39, page 355.

Description—Southwest one fourth of section twelve (12), in township twenty-four (24) south, range one (1) east, Willamette Meridian, containing 160 acres.

Witnesses: S. A. D. Puter and John Ford.

Acknowledged July 31, 1901, before S. A. D. Puter, Notary Public in and for Lane County, State of Oregon.

NO. 3. WARRANTY DEED.

<i>Grantor</i> —William H. Watkins (unmarried).	Consideration, \$640.00. Date, August 17, 1901. Recorded November 16, 1901. Book 39, page 368.
<i>Grantee</i> —Clyde D. Lloyd.	

Description—The southwest quarter (S. W. $\frac{1}{4}$) of section twelve (12), township twenty-four (24) south, range 1 east, containing 160 acres, situated in the County of Lane, and State of Oregon.

Witnesses: H. G. McKinley and B. M. Jones.

Acknowledged August 20, 1901, before H. G. McKinley, Notary Public in and for Lane County, State of Oregon.

NO. 4. WARRANTY DEED.

<i>Grantor</i> —William B. Abbott (unmarried).	Consideration, \$1.00. Date, July 27, 1901. Recorded September 21, 1901. Book 39, page 354.
<i>Grantee</i> —Emma L. Watson.	

Description—Southwest one fourth of section twelve (12), township twenty-four (24) south, range 1 east, Willamette Meridian, containing 160 acres.

Witnesses: S. A. D. Puter and Robert Simpson.

Acknowledged July 27, 1901, before S. A. D. Puter, Notary Public in and for Lane County, State of Oregon.

NO. 5. PATENT.

<i>Grantor</i> —The United States, by T. Roosevelt, President. F. M. McKean, Secretary.	Consideration, homestead. Date, November 20, 1901. Recorded February 10, 1902. Book 52, page 77.
<i>Grantee</i> —Samuel L. Carson.	

Description—East half of the northeast quarter, and the east half of the southeast quarter of section 14, in township 24 south, of range 1 east of the Willamette Meridian, in Oregon, containing 160 acres.

NO. 6. WARRANTY DEED.

<i>Grantor</i> —Samuel L. Carson (unmarried).	Consideration, \$1.00. Date, August 3, 1901. Recorded September 21, 1901. Book 39, page 351.
<i>Grantee</i> —Emma L. Watson.	

Description—East one half of northeast one fourth, east one half of southeast one fourth of section 14, township twenty-four (24) south, range one (1) east, Willamette Meridian, containing 160 acres.

Witnesses: Wm. B. Abbott and Robert Simpson.

Acknowledged August 3, 1901, before S. A. D. Puter, Notary Public in and for Lane County, State of Oregon.

NO. 7. WARRANTY DEED.

Grantor—Samuel L. Carson.*Consideration*, \$640.00.
Date, August 17, 1901.
Recorded November 16, 1901.
Book 39, page 369.*Grantee*—Clyde D. Lloyd.

Description—The east one half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$), and the east one half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section fourteen (14), in township twenty-four (24) south, range one (1) east, containing 160 acres, situated in the County of Lane, and State of Oregon.

Witnesses: H. G. McKinley and G. M. Caviness.

Acknowledged August 20, 1901, before H. G. McKinley, Notary Public in and for Lane County, State of Oregon.

NO. 8. PATENT.

Grantor—United States, by
T. Roosevelt, President.
F. M. McKean, Secretary.*Consideration*, homestead.
Date, November 20, 1901.
Recorded February 10, 1902.
Book 52, page 78.*Grantee*—James E. Warwick.

Description—West half of the northeast quarter, the southeast quarter of the northwest quarter, and the northwest quarter of the southeast quarter of section 14, in township 24 south, of range 1 east of Willamette Meridian, in Oregon, containing 160 acres.

NO. 9. WARRANTY DEED.

Grantor—James E. Warwick
(unmarried).*Consideration*, \$1.00.
Date, July 31, 1901.
Recorded September 21, 1901.
Book 39, page 353.*Grantee*—Mrs. Emma L. Watson.

Description—West one half of northeast one fourth, southeast one fourth of northwest one fourth, northwest one fourth of southeast one fourth of section 14, township 24 south, range 1 east, Willamette Meridian, containing 160 acres.

Witnesses—S. A. D. Puter and John Ford.

Acknowledged July 31, 1901, before S. A. D. Puter, Notary Public in and for Lane County, State of Oregon.

NO. 10. WARRANTY DEED.

Grantor—James E. Warwick.*Consideration*, \$640.00.
Date, August 17, 1901.
Recorded November 16, 1901.
Book 39, page 370.*Grantee*—Clyde D. Lloyd.

Description—The west one half ($\frac{1}{2}$) of the northeast one quarter ($\frac{1}{4}$), and the southeast quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$), and the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of section 14, township 24 south, range 1 east, containing 160 acres, situated in the County of Lane and State of Oregon.

Witnesses: H. G. McKinley and B. M. Jones.

Acknowledged August 20, 1901, before H. G. McKinley, Notary Public in and for Lane County, State of Oregon.

NO. 11. WARRANTY DEED.

<i>Grantor</i> — Emma L. Watson (widow.)	Consideration, \$2,100.00. Date, January 7, 1902. Recorded February 10, 1902.
<i>Grantee</i> — P. F. Woodford.	Book —, page —.

Description — In the County of Lane and State of Oregon, to wit: Southwest quarter section twelve (12), east half of northeast quarter, east half of southeast quarter, west half of northeast quarter, southeast quarter of northwest quarter, northwest quarter of southeast quarter, section fourteen (14), township twenty-four (24) south, range one (1) east, Willamette Meridian, containing four hundred and eighty (480) acres.

Witnesses — G. B. McLeod and H. R. Robertson.

Acknowledged January 7, 1902, before G. B. McLeod, Notary Public in and for Multnomah County, State of Oregon.

NO. 12. QUITCLAIM DEED.

<i>Grantor</i> — P. E. Woodford (widow).	Consideration, \$5.00. Date, February 18, 1902. Recorded February 19, 1902.
<i>Grantee</i> — G. B. McLeod.	Book —, page —.

Description — All my right, title, and interest in and to the following described parcel of real estate situate in County of Lane, State of Oregon, to wit: Southwest quarter (S. W. $\frac{1}{4}$) section twelve (12), northeast quarter, east half of southeast quarter, southeast quarter of northwest quarter, northwest quarter of southeast quarter (N. E. $\frac{1}{4}$, E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$) section fourteen (14), township twenty-four (24) south, range one (1) east, Willamette Meridian, containing 480 acres.

Witnesses: E. D. Johnson and Henry E. McGinn.

Acknowledged February 18, 1902, before Henry E. McGinn, Notary Public in and for Multnomah County, State of Oregon."

A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, having been overruled, a plea in abatement was interposed to the effect that plaintiff was not the real party in interest, but that he held the legal title to said real property in trust for the Astoria Company, a corporation organized and existing under the laws of this state. A demurrer to the plea, on the ground that it did not state facts sufficient to con-

stitute a defense, having been sustained, the defendant declined further to plead or answer, whereupon the court found the facts as stated in the complaint, and gave a decree canceling the deeds executed by Watkins, Carson, and Warwick to the defendant, removing the clouds cast thereby on plaintiff's title, and forever enjoining the defendant from asserting any claim to the premises; and he appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Francis D. Chamberlain*.

For respondent there was a brief over the names of *A. E. Wheeler* and *Jas. K. Weatherford*, with an oral argument by *Mr. Wheeler*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion.

It is contended by defendant's counsel that the complaint does not state facts sufficient to constitute a cause of suit, and that the court erred in overruling the demurrer thereto interposed on that ground, because: (1) The allegations of the complaint refer solely to the abstract of title, and not to the actual condition of such title; (2) it does not appear from the abstract that the deeds under which plaintiff claims title were sealed or acknowledged; (3) the patents do not seem to have been countersigned by the Recorder of the General Land Office; (4) the complaint fails to point out the infirmities in the deeds which it is claimed cloud plaintiff's title; (5) it presents no question of equitable right, thus showing that plaintiff's remedy was at law; (6) this suit cannot be maintained under Section 516, B. & C. Comp., as that statute was not designed to try legal titles only, but, if it was so intended, it is contrary to the organic law of the state, which guarantees to the defendant the right of a trial by jury; (7) Emma L. Watson, through whom plaintiff claims title, could not

maintain this suit for want of an averment that defendant had notice of her title, because the deeds to her express a consideration of only \$1 each, and therefore the conveyances were *prima facie* gifts, her deed not having been recorded until after her grantors reconveyed the premises by warranty deed to the defendant for full value; (8) plaintiff claims title under a quitclaim deed releasing only the grantor's interest in the land, and neither plaintiff nor his grantor was ever in possession of the premises, while defendant claims title under a warranty deed from the same parties through whom plaintiff derails title, and hence plaintiff is not entitled to equitable relief; and (9) plaintiff secured a quitclaim deed to the land on February 18, 1902, for the expressed consideration of only \$5, that he might bring this suit, which was instituted the next day, and therefore he is not entitled to invoke the aid of a court of equity.

1. Considering the legal principles insisted upon, in the order stated, it is argued by defendant's counsel that the complaint, the abstract of title attached thereto, and the verification clearly show that the cause of suit relates to the record title as shown in the abstract; that the actual title, and not the record title, controls; that there may be deeds executed to the defendant for said land that are not of record, but are binding on plaintiff, which give defendant a perfect title; that there may be facts not appearing of record that are binding on plaintiff, rendering his title inferior to the defendant's; and that it is not a sufficient averment to allege that plaintiff has the better title "according to the attached abstract of record." It will be remembered that the complaint alleges that plaintiff is the absolute and unqualified owner in fee simple of all the real property described therein, "as is shown by the abstract of title hereto attached, marked 'Exhibit A,' and made part hereof." It has been held in this state that identified

exhibits attached to a pleading constitute a part thereof, not for the purpose of supplying material averments, but with the design of particularizing the description and of itemizing the values stated therein: *Caspary v. Portland*, 19 Or. 496 (24 Pac. 1036, 20 Am. St. Rep. 842); *Riley v. Pearson*, 21 Or. 15 (26 Pac. 849). The exhibit which is made a part of the complaint is specific in character, and, under the rule adopted by this court, the statement in the pleading that plaintiff is the owner of the real property, as described by such exhibit, is equivalent to alleging that his title was secured from the source and derived from the persons named in the abstract. It is possible that facts not stated in the complaint, or that unrecorded deeds, may be in existence showing that defendant has the superior title; but, if this were so, no difficulty would have been encountered in alleging such facts in the answer. The averment of facts in the complaint, in respect to the title to the premises, as disclosed by the abstract, made a *prima facie* showing of the actual condition of the title, sufficient to render the allegation invulnerable to the demurrer, and, if the statement be false, the defendant had the privilege and should have controverted the facts stated therein.

2. An examination of the abstract discloses that the several deeds were acknowledged, and the names of the officers making the certificates thereof given, but it fails to specify that any of the deeds were sealed. The statute prescribing the mode of transferring the title to real property is as follows: "Conveyances of lands, or of any estate or interest therein, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved, and recorded as directed in this chapter without any other act or ceremony whatever:" B. & C. Comp. § 5333. The term "deed," in this state, is synonymous with a sealed instrument, so that the

statement in the abstract, not only of the deed adopted to effectuate the transfer of the title, but the character thereof, sufficiently implies that the several instruments enumerated in the chain of title were sealed.

3. All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land Office, and shall be recorded in the office, in books to be kept for the purpose: Rev. Stat. U. S. § 458 (U. S. Comp. St. 1901, p. 259). It shall be the duty of the Recorder of the General Land Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the office to all patents for public lands, and to attend to the correct engrossing, recording, and transmission of such patents: Rev. Stat. U. S. § 459 (U. S. Comp. St. 1901, p. 259). In *McGarrahan v. Mining Co.* 96 U. S. 316, Mr. Chief Justice WAITE, in speaking of the several steps necessary to evidence a transfer of public lands by the general government, says: "Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office and countersigned by the Recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory." It being incumbent upon the Recorder of the General Land Office to countersign all patents for public lands, and to affix his seal of office thereto, and also to attend to the transmission of such instruments, the statement in the abstract that the patents there mentioned were recorded invokes the presumption that official duty

has been regularly performed (B. & C. Comp. § 788, subd. 15), and justifies the inference that the patents in question were issued with all the formalities that the law requires.

4. A suit to remove a cloud upon a title is instituted to determine the invalidity of an apparently efficacious instrument, the infirmities of which cannot be ascertained from inspection, but resort must be had for that purpose to extrinsic evidence, to let in which it is necessary to allege in the complaint the facts constituting such invalidity: *Teal v. Collins*, 9 Or. 89; *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. 662). In *Shannon v. Portland*, 38 Or. 382 (62 Pac. 50), Mr. Justice WOLVERTON, commenting upon the sufficiency of the allegation and the nature of the proof necessary to sustain a suit of this character, says: "It is essential to the maintenance of such a suit to assert and establish (1) the particular muniment or record constituting the cloud; and (2) the infirmity attending it which renders it a nullity as to the complainant, for, if he does not show it to be a nullity, he must fail of his purpose." In *Lick v. Ray*, 43 Cal. 83, the court, defining what constitutes a cloud on title and when a suit for its removal may be maintained, say: "It is settled by a long line of decisions in this court that if the title against which relief is prayed be of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud which the latter has the right to call upon the court to remove and dissipate." It must be assumed in the case at bar that the deeds set out in the abstract, numbered 3, 7, and 10, respectively, are apparently valid instruments, and that an inspection thereof would not disclose any imperfections therein; but when the deeds executed to Emma L. Watson, and recorded prior to those the defendant received, are considered, the conclusion reached necessarily tends to render

the latter's deeds ineffectual, because his grantors, having parted with the title to the land, had none to transfer. It will be remembered that the complaint alleges that the defendant claims some interest, right, or title to said lands, which claim is unfounded, illegal, unjust, and contrary to law and to equity, as shown by said Exhibit A. This averment, aided as it is by the exhibit, which calls attention to the public record, is, in our opinion, a sufficient compliance with the rule requiring the complaint to allege the facts constituting the invalidity of the instruments which cast a cloud upon title; for the object of every pleading is to call the attention of the court and of the adverse party to the facts relied upon to sustain the theory adopted by the pleader, and, when such facts are matters of public record, the volume and page of which are given, as in the case at bar, and thus presumptively within the defendant's knowledge, the necessity for the same degree of particularity in stating them does not exist as in other cases.

5. The mode provided for the recovery of real property is as follows: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof": B. & C. Comp. § 326. It will be remembered that the complaint, in referring to the real property in question, contains the allegation "that the said lands are all unseated, unimproved, and unoccupied, and not in the actual possession of any person." It will be observed that the language quoted does not in express terms negative the fact that defendant, though not in possession of the real property, may have been acting

as the owner thereof at the time the suit was instituted ; but we are of the opinion that the averment that "said lands are all unseated, unimproved, and unoccupied " is equivalent to such negation. In *Kennedy v. Daily*, 6 Watts, 269, it was held that residence without cultivation, or cultivation without residence, or both, constitutes seated land. The term "unseated," when used to denote a condition of real property, would therefore seem to mean that class of lands which are neither in the possession of or cultivated by any person. It must be admitted that almost every act of ownership of real property necessarily results in improving its condition, for, in *Garner v. Marshall*, 9 Cal. 268, in illustrating the expression, "exercise of acts of ownership," Mr. Justice FIELD remarks that they are "such as inclosure, cultivation, and the like," and hence the averment that the premises in question were unimproved impliedly negatives the fact that defendant was acting as the owner thereof, so that, if it be necessary to negative a right of action for the recovery of real property before a court of equity could acquire jurisdiction to remove a cloud from the title thereto—a question not necessary to a decision herein—the complaint complies with such requirement.

6. The statute regulating the mode of removing a cloud from and of quieting the title to real property is as follows : "Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates": B. & C. Comp. § 516. Though a suit to remove a cloud and one to quiet title are essentially different in the manner of stating the facts constituting the equitable right, the relief is substantially identical in both cases, and, this being so, a person claiming an interest or estate in real property

not in the possession of another may maintain a suit to remove a cloud on his title without being in the actual possession of the premises, the amendment of the statute (Laws, 1899, p. 227) having enlarged the equitable remedy: *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. 662). In *Head v. Fordyce*, 17 Cal. 149, Mr. Chief Justice FIELD, construing the language of a similar act, says: "The statute giving this right of action to the party in possession does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension. The plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property." To the same effect see *Dean v. City of Madison*, 9 Wis. 402. The invalidity of defendant's claim to the premises is not apparent from an inspection of his deeds, and is only shown by the introduction of plaintiff's deeds. The editors of the Encyclopedia of Pleading and Practice, in a note to volume 17, page 286, in discussing the adequacy of a legal remedy to defeat a suit instituted to remove a cloud on title, say: "Where the facts which show the invalidity of the claim are all of record, the bill will not be entertained." The force of this rule, in the absence of a statute prescribing a contrary method, is not to be denied, but it must be admitted that the legislative assembly possessed plenary power to regulate the mode of procedure in suits in equity in all cases, and may enlarge the jurisdiction of courts in reference thereto, unless in doing so the rights of a defendant are necessarily abridged.

The organic law of the state contains the following declaration: "In all civil cases, the right of trial by jury shall remain inviolate": Const. Or. Art. I § 17. The statute prescribing the character of the subject-matter of which equity will entertain jurisdiction is as follows: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this title": B. & C. Comp. § 390. In *Grand Rapids & I. Ry. Co. v. Sparrow*, 36 Fed. 210 (1 L. R. A. 480), a suit having been commenced in a state court to quiet the title to certain real property, was removed into a federal court, where it was contended that an amendment of a statute of Michigan, permitting a person claiming the legal or equitable title to lands, "whether in possession or not," to institute a suit against any other person, "not in possession," setting up a claim thereto in opposition to the title claimed by the claimant, violated the right of a trial by a jury. It was held, however, that the right insisted upon was not infringed, the court saying: "Respecting the argument that the act of the legislature of Michigan (Pub. Acts 1887, No. 260, p. 337), extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is unconstitutional because it deprives the defendant of the right to trial by jury secured by the Constitution of Michigan (Article VI, § 27), I think it must be held that this constitutional provision extends only to cases where by the common law a trial by jury was customary. It does not reach those cases where the remedy is given by statute. At common law ejectment did not lie where the defendant was not in possession, and it is sus-

tainable in such a case only by virtue of the statute in Michigan." In *Wong v. Astoria*, 13 Or. 538 (11 Pac. 295), Mr. Justice THAYER, in speaking upon this subject, says: "The right of trial by jury provided for in the Constitution of the United States, and of various states, is understood to mean the common-law trial by jury." The defendant not being in possession of the real property in controversy, nor acting as the owner thereof, plaintiff could not have maintained an action of ejectment against him (B. & C. Comp. § 326); and, as defendant's common-law right to a trial by jury depended upon his possession, the statute enlarging plaintiff's remedy by permitting him to maintain a suit to remove a cloud upon title, though also not in possession, does not deprive the defendant of any right guaranteed him by the fundamental law of the state.

7. The abstract attached to the complaint shows that the deeds executed by Watkins, Abbott, and Carson, respectively, to Emma L. Watson, under whom plaintiff's title to the premises is derived, each express a consideration of only \$1; and it is argued by defendant's counsel that these conveyances to her were *prima facie* voluntary, and presumptively fraudulent as to the defendant, who paid full value for the premises, and that, as the complaint did not allege that defendant secured his deeds with notice of the prior conveyances to her, it did not state facts sufficient to constitute a cause of suit, and that the court erred in overruling the demurrer thereto. The statute of 27 Elizabeth, c. 4, provides in effect that all conveyances of lands, etc., made with intent to defraud subsequent purchasers, shall, as against such purchasers, their heirs, and all other persons claiming under them, who shall purchase for money or other good consideration, be void: Bispham, Equity, (4 ed.), § 250; 4 Kent, Com. *463. Our statute upon this subject, so far as deemed applicable herein, is as follows: "Every conveyance * * of lands * * made

* * with intent to defraud * * subsequent purchasers for a valuable consideration of the same lands * * as against such purchasers shall be void": B. & C. Comp. § 5502. "No such conveyance * * shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance * * was privy to the fraud intended": B. & C. Comp. § 5503. A perusal of this act will disclose that, to render such a conveyance inoperative, the grantor must have actually intended to defraud the subsequent purchaser, who must have paid a valuable consideration for the land and secured a deed therefor without notice of the prior conveyance; or, if he had such notice, then, to protect him, he must be able to establish the fact that the prior grantee was a party to the original fraud. To defeat plaintiff's title, the burden of alleging a want of notice, or, if notice was given, then that the prior grantee participated in the fraud, was imposed upon the defendant. In *McIntyre v. Kamm*, 12 Or. 253 (7 Pac. 27), Mr. Chief Justice WALDO, discussing a similar question, makes the following observation: "This being a controversy between legal titles, the defendants could have assailed the plaintiff's title on the ground of notice or want of consideration at law: *Jackson v. Burgott*, 10 Johns. 457 (6 Am. Dec. 349). But the burden was on the defendants to set up the facts invalidating the plaintiff's title, and to prove them at the trial." Assuming, without deciding, that the recital of \$1 as a consideration affords *prima facie* evidence of voluntary conveyances executed by Watkins, Carson, and Warwick to Emma L. Watson, the burden was not imposed upon plaintiff to allege or prove a negative, but upon the defendant to aver a want of notice, or, if such notice were given or implied, to state such facts as would obviate the

effect thereof. Not having done so, the alleged want of notice cannot be raised by demurrer.

8. Plaintiff claims title under a quitclaim deed from persons who were never in possession of the premises, while defendant claims title by warranty deed for full value from the persons through whom plaintiff derives his title, and it is maintained that because the complaint fails to aver fraud, accident, or mistake, it does not state facts sufficient to warrant equitable interference. The point contended for is without merit, for in *Dull's Appeal* 113 Pa. 510 (6 Atl. 540), it was held, in a suit to remove a cloud from title, that the authority of a court of equity to grant relief in such cases did not depend upon an allegation of the facts insisted upon, Mr. Justice GREEN, speaking for the court in deciding the case, saying: "The jurisdiction has been asserted and enforced as an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, or account, or, indeed, any other basis of equitable intervention."

9. If it be conceded that plaintiff secured a quitclaim deed to enable him to maintain this suit, and that he instituted it the next day after his deed was executed, such facts did not defeat his right, and, believing, as we do, that the complaint stated facts sufficient to constitute a cause of suit, no error was committed in overruling the demurrer.

10. It is contended by defendant's counsel that the plea in abatement shows that plaintiff was not the real party in interest, and that the court erred in sustaining a demurrer thereto. The complaint alleges that plaintiff is the absolute and unqualified owner of the property in fee simple, and the abstract tends to show that he held the legal title thereto. If, however, the conveyance was made to him in trust for the Astoria Company, he nevertheless by his deed secured such an interest in the premises as

would enable him to maintain this suit, for the rule is well settled that an agent who makes a contract in his own name, without disclosing the name of his principal, may maintain a suit in his own name: Bliss, Code Pl. § 57; Pomeroy, Code Rem. § 141. No error was committed in sustaining his demurrer to the plea.

11. It is also maintained by defendant's counsel that there was no evidence introduced at the trial upon which to base the findings made by the court. There being no answer to the merits, no issue of fact was presented for trial, and, this being so, the court very properly made its findings in conformity with the averments of the complaint, which were tacitly admitted. The statute of this state limiting the time within which a deed should be recorded, and prescribing the consequences that may possibly result from a failure to comply therewith, is as follows: "Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded": B. & C. Comp. § 5359. In *Fleschner v. Sumpter*, 12 Or. 161 (6 Pac. 506), in construing the language quoted, it was held that, where neither of two conveyances is recorded within the time prescribed, the one that is thereafter first recorded will take priority. Mr. Justice THAYER, in deciding the case, says: "The prior recording of the prior conveyance at any time after its execution will give it precedence. So will the prior recording of the subsequent conveyance give it precedence over a prior one subsequently recorded, although neither of them be recorded within the five days." In the case at bar the abstract, which is made a part of the complaint, shows, and the demurrer thereto admits, that the deeds executed to Emma

L. Watson, plaintiff's predecessor in interest, July 27 and 31, and August 3, 1901, respectively, were recorded September 21st of that year, and that the deeds executed by her grantors to the defendant and acknowledged August 20, 1901, were not recorded until November 16th of that year. The defendant's deeds not having been recorded within five days after their execution, and those executed to plaintiff's predecessor in interest having been first recorded, the court, by invoking the maxim that where there are equal equities the first in time shall prevail, properly concluded that plaintiff's right to the relief sought was thereby established, and, concurring in that view, the decree is affirmed.

AFFIRMED.

ON MOTION TO RECALL MANDATE AND FOR LEAVE
TO ANSWER.

PER CURIAM. 12. This is a motion to recall the mandate in order that a provision may be inserted therein permitting the defendant to apply to the court below for leave to answer by pleading that the property in controversy is not in Lane, but is in Douglas County, and that the defendant's deed, although of subsequent date to plaintiff's, was first recorded in the latter county. In the court below the defendant demurred to the complaint, but his demurrer was overruled, and he declined to plead further. A decree was then entered in favor of the plaintiff, as prayed for in the complaint, from which an appeal was taken, and the decree was affirmed. In cases of this character, it is discretionary with this court either to enter a final decree here, or to remand the suit for such further proceedings as it may deem right and proper.

13. If the case be remanded, it is open to the court below to determine in the first instance whether the defendant shall be permitted to plead further: *Powell v. Dayton*

S. & G. R. Co. 14 Or. 22 (12 Pac. 83); *Fowle v. House*, 30 Or. 305 (47 Pac. 787); *State ex rel. v. Metschan*, 32 Or. 372 (46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692). The question as to the proper procedure in the present suit was presented and determined on the petition for rehearing, and the conclusion then reached necessarily disposes of the present motion.

MOTION OVERRULED.

Decided 29 June, 1903.

HOOVER v. KING.

[72 Pac. 880.]

JUDGMENT IN EJECTMENT AS RES JUDICATA.

1. A judgment in an action of ejectment dismissing the complaint and awarding costs to defendant, based on a verdict finding for the defendant and against the plaintiff, is not a bar to another ejectment action for the same land, for it does not appear by either the verdict or judgment that there was a determination of the question of title directly or inferentially.

RES JUDICATA—INFERENCE AS TO AMBIGUOUS JUDGMENT.

2. When a case presents more than one issue on which the judgment may rest, one of which goes to the merits, while the others do not, it will be inferred that the judgment was not based on the merits, unless it so appears.

FORMS OF FINAL ORDERS IN LAW AND EQUITY—PRACTICE.

3. Under the Oregon practice a law action is disposed of by a judgment for plaintiff or defendant, or one of nonsuit, while a suit in equity either passes to a decree or is dismissed; but a judgment of dismissal is unknown at law.

JUDGMENT AS AN ESTOPPEL.

4. The conclusive element in a final order that makes it available as an estoppel is its decision on the merits of the dispute, and not that it is in favor of one or another party.

From Harney: MORTON D. CLIFFORD, Judge.

This is an action by Newton Hoover against W. J. King and others to recover possession of the east $\frac{1}{2}$ of the southwest $\frac{1}{4}$ of section 8, township 25 south of range 35 $\frac{1}{2}$ east, in Harney County, which plaintiff tried to recover possession of from the same defendants in an action begun in 1889, wherein he alleged in his complaint that he was the owner in fee simple and entitled to the possession of the property, and that the defendants and each of them wrongfully and unlawfully withheld possession from him. The defendants answered, denying the plaintiff's title or right

to the possession, or that they wrongfully or unlawfully withheld possession from him, and for an affirmative defense pleaded title in the defendant, Mrs. Alice L. Bartlett. A trial was had, and the jury returned the following verdict, omitting title: "We, the trial jury in the above-entitled action, find for the defendants Alice L. Bartlett and George W. Bartlett, and against the plaintiff, Newton Hoover." Upon motion of defendants for judgment on the verdict, it was "ordered and adjudged that said motion for judgment be, and the same is hereby, granted and allowed, and that plaintiff's complaint filed herein be, and the same is hereby, dismissed, and the defendants have and recover of and from the plaintiff their costs and disbursements herein, taxed at \$16." Thereafter the plaintiff commenced the present action. The complaint is in the usual form. The answer denies the material allegations thereof, sets up title in the defendant, Alice L. Bartlett, and pleads as a bar the judgment in the former action. The court held the plea in bar good, and instructed the jury that the former judgment was a sufficient defense to this action. Notwithstanding this instruction, however, the jury found that the plaintiff was the owner in fee simple of the premises in controversy, returned a verdict in his favor, and assessed his damages at \$700. The verdict was set aside on motion of the defendants, and a new trial ordered, upon which the jury, by direction of the court, returned a verdict in favor of the defendants. From the judgment entered thereon plaintiff appeals.

REVERSED.

For appellants there was a brief over the names of *John G. Saxton* and *Will R. King*, with an oral argument by *Mr. King*.

For respondents there was a brief over the name of *Parrish & Rembold*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The only question presented by this appeal is whether the judgment in the former action is a bar to this. At common law, ejectment was a mere possessory action between fictitious parties. The judgment therein did not determine the estate or interest of the parties in the property, nor did it conclusively determine the right to possession. It therefore was not a bar to another or subsequent action to recover possession of the same property: 2 Black, Jud. § 650. But in the majority of the states of the Union the common-law action has been pruned of its fiction and artificiality, and made a simple remedy for the recovery of the possession of real property and the trial of the title thereto. It has generally been prescribed, either expressly or by necessary inference, that the judgment in such an action shall be conclusive between the parties and privies. Such are the provisions of our statute. Any person having a legal estate in real property and the present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law: B. & C. Comp. § 326. The plaintiff is required to set forth in his complaint the nature of his estate, whether in fee, for life, or for a term of years, and for whose life, or the duration of such term: B. & C. Comp. § 328. The defendant is not allowed to give evidence of any estate in himself or another, or any license or right to the possession of the property, "unless the same be pleaded in his answer," with "the certainty and particularity required in a complaint": B. & C. Comp. § 329. The jury are required to find, if their verdict is for the plaintiff, "that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be," and, if for the defendant, "that the plaintiff is not entitled to the possession of the property described in

the complaint, or to such part thereof as the defendant defends for, and the estate in such property or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect, as the same is required to be pleaded": B. & C. Comp. § 330. The judgment "shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party, after the commencement of such action, except as in this section provided": B. & C. Comp. § 339. It is thus apparent that the statute contemplates that the title to land may be tried in an action to recover possession thereof, and that, so far as the same is tried and determined, the judgment therein is conclusive upon the party against whom it is given: *Barrell v. Title Guarantee Co.* 27 Or. 77 (39 Pac. 992); *Moores v. Moores*, 36 Or. 261 (59 Pac. 327). But it is only when it appears from the judgment that the title has in fact been tried and determined that it can have such an effect. At common law, the judgment in an action to recover real property was not conclusive upon the parties, nor is it conclusive under the statute, unless it is within the terms thereof. It is declared in express terms that the judgment is conclusive on the title only "so far as the same is thereby determined," and "that only is deemed to have been determined by a former judgment, decree, or order which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto": B. & C. Comp. § 748.

Now, looking at the verdict and judgment in the former action brought by the plaintiff to recover possession of the property now in controversy, all that appears to have been determined thereby is that the jury found "for the defendants," that the complaint was dismissed, and costs were

awarded to the defendants. There is no finding by the jury nor adjudication by the court concerning the title, nor was it necessarily included in the judgment rendered, or essential thereto. There were two issues in the case — one as to the plaintiff's title, and the other as to his right to the immediate possession of the property in controversy. A finding and judgment adverse to him on either issue would have defeated the action; but the record does not disclose whether the judgment was based upon the one or the other. The verdict affords no information on the subject. It contains no finding as to the title or right to the possession of the property. It does not conform to the requirements of the statute, and any judgment that might have been entered thereon would have been erroneous and reversible on appeal: *Long v. Linn*, 71 Ill. 152; *Pensacola Ice Co. v. Perry*, 120 U. S. 318 (7 Sup. Ct. 576); *Oney v. Clendenin*, 28 W. Va. 34. If the jury had found that the plaintiff was not entitled to the possession of the property, and that Mrs. Bartlett was the owner in fee thereof and entitled to the possession as pleaded in the answer, a judgment entered thereon, merely dismissing the complaint and awarding costs, might perhaps have been construed as an adjudication of the title, and therefore a bar to a subsequent action: 2 Black, Judgm. § 703; *Amory v. Amory*, 26 Wis. 152; *Granger v. Singleton*, 32 La. Ann. 898. So, too, a judgment rendered on the verdict actually returned, determining the question of title, might perhaps have been sufficient on a collateral attack; but, when neither the verdict nor the judgment contains any finding or adjudication on such issue, it is not perceived on what theory the court would be justified under our statute in holding that the judgment is a bar to the present action.

2. When there are two issues in a case, upon either of which the judgment may rest, one going to the merits and the other not, its disposition will generally be con-

sidered as resting upon the latter; the merits remaining adjudicated, unless the judgment appears to have been upon the merits: 21 Am. & Eng. Ency. Law (1 ed.), 265. Now, the verdict in the former action was simply a finding in favor of the defendants, and the judgment merely dismissed the complaint and taxed costs and disbursements against the plaintiff. Only two points were thereby determined: (1) That the complaint should be dismissed, no grounds therefor being stated; and (2) that the defendants should have judgment for their costs. Neither of these questions necessarily went to the merits of the title. Either could properly rest on the failure of the plaintiff to show a right to the immediate possession of the property, and, in view of the rule stated, it will be so considered.

3. A judgment dismissing a complaint in an action at law is a proceeding unknown to the statute, and does not necessarily determine any of the issues involved. Costs are but an incident to the judgment, and do not add to its force or effect. A bill or suit in equity may be "dismissed," and such dismissal is an effectual bar to a subsequent suit for the same cause, unless given without prejudice: B. & C. Comp. § 412. An action at law, however, is disposed of either by a judgment in favor of the plaintiff or defendant, or one of nonsuit. If the former, the cause of action is determined, and it is brought to an end. If the latter, only the pending action is disposed of, and another may be brought upon the same cause: *Hughes v. Walker*, 14 Or. 481 (13 Pac. 450). Since neither the verdict nor the judgment in the former action shows that the title to the property was tried and determined, the judgment can, in our opinion, have no more force than a nonsuit, and is not a bar to a subsequent action to recover possession of the same property: *Fitch v. Cornell*, 1 Sawy.

156 (Fed. Cas. No. 4,834); *Hughes v. Wheeler*, 76 Cal. 230 (18 Pac. 386).

4. It is not the recovery by the defendants that constitutes the bar or estoppel, but the decision upon the merits of the question which is in dispute between the parties: *Dawley v. Brown*, 79 N. Y. 390; *King v. Townshend*, 65 Hun, 567 (20 N. Y. Supp. 602); same case, 141 N. Y. 358 (36 N. E. 513).

It was insisted at the argument that, if the court should conclude that the court below was in error in holding the former judgment a bar, the cause should be remanded, with directions to enter a judgment on the verdict returned on the first trial of the present action. The verdict was contrary to the instructions of the trial court, for which reason it was set aside and a new trial awarded; and we do not think that we would be justified, under the circumstances, in so remanding the cause.

The judgment will be reversed, and a new trial ordered.

REVERSED.

Decided 6 July, 1903.

STATE ex rel. v. BANFIELD.

[72 Pac. 1093.]

CONSTRUCTION OF STATUTES—MEANING OF LEGISLATURE.

1. The act of 1903, purporting to amend the statutes relating to The Port of Portland (Laws, 1903, p. 339), was intended as an amendment of the act of 1901 on the same subject. This is evident from the language of the title of the act, and from a comparison of the act of 1901 with an act on the same subject in 1899, which does not contain any sections numbered to correspond with those revised by the latest act.

QUOTATION AND PUNCTUATION MARKS—STATUTES.

2. Quotation marks are points of punctuation, and, like other such points, are not controlling in determining the real meaning of an act or its title, but may be entirely disregarded or rearranged as the meaning may require.

STATUTES—TITLE OF AMENDATORY ACT—CONSTITUTION.

3. The requirement of Const. Or. Art. IV, § 20, that "every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title," is complied with, in the case of an amendatory act, by any designation that identifies with reasonable certainty the law to be modified.

JUDICIAL NOTICE OF DATES OF LEGISLATIVE ACTS.

4. Under B. & C. Comp. § 720, subd. 3, providing that courts will take judicial notice of the "public and private official acts of the legislative, executive, and judicial departments of this state," the courts may properly consider the dates of the enactment of the various statutes relating to The Port of Portland.

From Multnomah: ARTHUR L. FRAZER, ALFRED F. SEARS, JR., and MELVIN C. GEORGE, Judges, in joint session.

Quo warranto by the State of Oregon, on the relation of Chas. F. Swigert and others, against M. C. Banfield and others, to determine the right to an office. There was a judgment for relators and defendants appeal. The case was submitted on briefs under Rule 16 (35 Or. 600, 601).

AFFIRMED.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*.

For respondents there was a brief over the names of *John Manning*, District Attorney, and *Carey & Mays*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a proceeding to determine whether the relators or the defendants are entitled to exercise the power and authority vested in the board of commissioners of The Port of Portland. The questions involved relate to the construction and sufficiency of the title of the act of 1903, which act purports to invest the relators with such power and authority, and, if valid, displaces the defendants, who constitute the present board. The following is a literal copy of the title, including quotation marks (Laws, 1903, p. 339):

An act to amend section 25 and section 28 of an act entitled an act to revise and amend an act entitled "An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea, passed by the Legislative Assembly of the State of Oregon in the year 1891, and filed in the office of the Secretary of State February 18, 1891; and to repeal an act entitled an act to amend an act of the Legislative Assembly of the State of Oregon, filed in the office of the Secretary of State February 18, 1891, entitled an act to estab-

lish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea, and filed in the office of the Secretary of State February 10, 1893, and to repeal an act entitled an act to amend an act entitled an act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea, filed in the office of the Secretary of State February 18, 1891; and to amend an act entitled an act of the Legislative Assembly of the State of Oregon, filed in the office of the Secretary of State February 18, 1891, entitled an act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea, filed in the office of the Secretary of State February 10, 1893," and approved February 18, 1899.

The first section of the act, observing the quotation marks as therein set forth, reads in part as follows:

That section 25 of an act entitled an act to revise and amend an act entitled "An act to establish and incorporate the Port of Portland, * * filed in the office of the Secretary of State February 10, 1893," and approved February 18, 1899, be amended to read as follows.

The title of the act of 1901 reads, preserving its form of quoting (Laws, 1901, p. 417):

An act to revise and amend an act entitled "An act to establish * * filed in the office of the Secretary of State February 10, 1893," and approved February 18, 1899.

In this title it will be noted that the closing words, "and approved February 18, 1899," are not contained in the quotation marks of the title of the act to be amended. The title of the 1899 act (Laws, 1899, p. 146) reads, literally:

An act to amend an act entitled "An act * * " filed in the office of the Secretary of State February 10, 1893.

This gives a sufficient outline of the situation. The

judgment of the trial court being favorable to the relators, the defendants appeal, and in support thereof make two contentions: (1) That the act in question is void, because it was designed to be amendatory of the act of 1899, which had theretofore been repealed by the act of 1901; and (2) that, if designed to be amendatory in any respect of the act of 1901, it is void, because the latter act is not sufficiently described so as to indicate with reasonable certainty and definiteness that it is the act intended to be amended.

1. Speaking of the first contention, there is some confusion, caused, no doubt, by the inappropriate or inaccurate use of the quotation marks. If they had been so placed as to include the words, "an act to revise and amend an act entitled," at the beginning, and the words, "and approved February 18, 1899," at the conclusion of the title, there could have been no mistaking the purpose of the legislature to amend the act of 1901. By section 1 it is provided "that section 25 of an act," running in exact language and punctuation as the title of the act of 1901, "be amended to read as follows," section 25, as amended, being then set forth *in extenso*. And section 2 provides "that section 28 of said act be amended to read as follows," setting forth the section in like manner as with section 25. A reference to the act of 1899 shows it to be "An act to amend an act entitled 'An act to establish and incorporate the Port of Portland, * * ' filed in the office of the Secretary of State February 10, 1893." The act under consideration is entitled, "An act to amend section 25 and section 28 of an act entitled 'An act to revise and amend an act entitled 'An act to establish and incorporate the Port of Portland, * * ' ' " thus indicating unmistakably that the amendment contemplated was not of the amendatory act of 1899, but of sections 25 and 28 of a revisory and amendatory act to establish and incorporate

the Port of Portland, necessarily different and distinct from it. Another feature rendering it impossible that reference could have been made to the act of 1899, if we may be permitted to make note of it, is that it contains but eight sections, numbered consecutively, while the act of 1901 contains sections corresponding in number to those stated by the bill; so that it is made absolutely certain that the present act was not intended to be amendatory of the act of 1899.

2. Quotation marks are marks of punctuation (Webster's Intern. Dict.), and the punctuation of an act or its title is not controlling in construing it for the purpose of ascertaining its real meaning. Says Mr. Justice HARLAN, in *Hammock v. Loan & Trust Co.* 105 U. S. 77, 84, "punctuation is no part of the statute," and this court, in treating of the subject, has declared the rule to be that "courts will, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation, or repunctuate, if need be, to render clear the true meaning of the statute" (*Baker v. Payne*, 22 Or. 335, 341, 29 Pac. 787), employing very nearly the language of the court in *Hamilton v. Steamboat R. B. Hamilton*, 16 Ohio St. 428. See, also, *Allen v. Russell*, 39 Ohio St. 336; *Albright v. Payne*, 43 Ohio St. 8 (1 N. E. 16); *Cushing v. Worrick*, 9 Gray (Mass.), 382; *Gyger's Estate*, 65 Pa. 311. *Commonwealth v. Taylor et al.* 159 Pa. 451 (28 Atl. 348), is a case of much similarity to the one at bar, involving the inappropriate use of the quotation marks, wherein the latter of subquotation marks was treated as if set back to the end of a preceding clause in the title, the sense being otherwise clear and perspicuous. So it is with the title of the present act. The meaning is clear, and we have only to readjust the quotation marks to relieve it of all confusion or doubt. The first contention is therefore not sustained.

3. The explicit objection involved in the second contention is that the title of the act omits any reference to the date of the passage of the act intended to be amended, or of its approval or filing with the Secretary of State, or any indication as to where it may be found in an authorized publication of the statutes or laws of the state, thus rendering the title indefinite and uncertain as to the statute or act intended to be amended, and therefore that it is not within the precept of the Constitution Art. IV, § 20, that "every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title." As a general rule, any reference to the law to be amended, or designation of it by which it can with reasonable certainty be determined what law is intended, is sufficient to meet such constitutional requirements: *Hearn v. Louttit*, 42 Or. 572 (72 Pac. 132). It was held, in *Shoemaker v. Smith*, 37 Ind. 122, in accordance with this principle, that "there was no need of stating the date of the approval of the amended law. This is usually, but not necessarily, done, and the omission can be of no consequence if the law intended to be amended is pointed out with such reasonable certainty as to identify it. This is done by a substantial recital of its title, and we will take judicial notice that there is no other statute bearing such title." Barring quotation marks, and perhaps some other punctuation, the title of the act of 1901 is exactly stated in the title of the act in question, so that there is no chance of mistaking the act or statute designed to be amended, and the constitutional requirement has been met.

4. The public character of the different acts relating to the Port of Portland will admit of the court taking judicial notice of their enactment (B. & C. Comp. § 720), and therefore no obstacle stands in the way of determining the

identity of the act intended to be amended from the title of the act in question.

These considerations are in affirmance of the judgment of the trial court, and such will be the order of this court.

AFFIRMED.

Argued 22 June, decided 6 July, 1903.

EARLE v. EARLE.

[72 Pac. 976.]

DIVORCE—MISCONDUCT OF PLAINTIFF AS A DEFENSE—PLEADING.

Misconduct of plaintiff amounting to a cause for divorce is a defense to a suit to dissolve the marriage relation, and it will be considered whenever it appears in evidence whether pleaded or not; this under the general rule that those who come into equity must come with clean hands.

From Coos: JAMES W. HAMILTON, Judge.

Suit by Lou L. Earle against Sylvester Z. Earle for a divorce, resulting in a decree of dismissal, from which plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *John F.* and *James T. Hall*, with an oral argument by *Mr. John F. Hall*.

For the state there was a brief over the name of *George M. Brown*, District Attorney.

PER CURIAM. This is a suit for a divorce on the ground of desertion. The defendant was served by publication, but did not appear. The state appeared by the district attorney. Plaintiff and defendant were married in July, 1896, while on board a steamship off the coast of Guatemala. A few months later they returned to Marshfield, where they lived together at intervals until March, 1900, when defendant left the state and has never returned. At the trial it was disclosed by the evidence of plaintiff's witnesses that she was then, and for many years prior thereto had been, a prostitute and the keeper of a house of ill-fame in Marshfield. Upon this state of the record, the court

below dismissed the complaint, and properly so. "It is," says Mr. Bishop, "a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complaint of *delictum* transpired the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort." 2 Bishop, Marriage, Div. & Sep. § 365. This is for the obvious reason that the law forbids redress to the plaintiff who is in equal default with the defendant, and helps those who obey it, and not those who violate it. The plaintiff's conduct since defendant's alleged desertion of her is a cause for divorce, and therefore a defense to this suit. It does not matter that the defendant made default. The state is deemed a party defendant in any suit for the dissolution of a marriage contract (B. & C. Comp. § 995), and when it appeared that plaintiff was a prostitute, and a violator of both the moral and statutory law, the court rightfully refused her relief. AFFIRMED.

Decided 6 July, 1903.

GRAHAM v. MERCHANT.

[72 Pac. 1088.]

CONSTRUCTION OF PLEADING AS TO THE PLEADER.

1. Pleadings are usually construed against their authors in cases where the meaning is uncertain; as, in this case, which is an action for money had and received, brought by a vendee of land under a contract providing that the vendor might rescind and forfeit payments then made, in case any required payment should not be made at the appointed time, where it appeared that the last installment of the purchase price was due on March 15th, and that a stated sum had been received prior to July 28th of the same year, it must be inferred that this sum was received after March 15th.

TIME AS ESSENCE OF A CONTRACT—EXERCISE OF RIGHT TO FORFEIT.

2. A provision in a contract for the sale of realty, giving the vendor the right of forfeiture upon default in a stipulated condition to be performed by the vendee, is valid and enforceable.

OPTION TO FORFEIT MUST BE EXERCISED.

3. A right to declare a forfeiture of a contract is one that must be affirmatively exercised by the person reserving it.

VENDOR—WAIVING RIGHT TO FORFEIT—PAYMENT BY VENDEE.

4. Where a contract for the sale of land provided for the payment of the purchase price in installments, and stipulated that, if any installment should not be

43	294
148	512
43	294
45	147
43	294
46	457
43	294
48	603

paid when due, the vendor might take possession of the land, and declare forfeited all payments which had been made, the acceptance of a payment by the vendor after the vendee was in default was an election to consider the contract still in force.

NOTICE BY VENDOR OF ELECTION TO FORFEIT.

5. Under such a contract, while the vendee is in default under a waiver of the right to declare a forfeiture, the vendor cannot forfeit except after notice and after allowing the vendee a reasonable time within which to comply with the terms of the contract.

INSTRUCTION AS TO BURDEN OF PROOF.

6. In an action by the vendee to recover payments made on a contract for the sale of land, providing that, in case the vendee should make default in the payment of any of the installments of the purchase price, the vendor might declare forfeited the payments previously made, and reënter on the land, it was admitted that the last payment was not made when it was due, the vendee alleging the making of an oral contract for an extension of time. The vendor requested an instruction that the burden was on plaintiff to prove by the preponderance of the evidence that such agreement had been entered into, and that, unless the jury so found, their verdict should be for the vendor. *Held*, that this request was included in a charge that the burden was on plaintiff to prove the allegations of the complaint, and to prove by a preponderance of the evidence that a parol contract had been entered into as alleged, and that if the vendee made default, and while such default continued the vendor demanded payment, and retook possession of the premises and exercised control over them, the vendee could not recover.

INSTRUCTION WITHIN ISSUES OF PLEADINGS—RESCISSON BY VENDOR.

7. A contract for the sale of land stipulated for the payment of the purchase price by installments, and provided that, if default should be made in the payment of any installment, the vendor might reënter, and declare forfeited the installments paid. After a reëntry by the vendor, the vendee sued to recover the installments which he had paid. The plaintiff alleged that after the time of default he made a payment on the land, which was accepted under the contract. The defendant denied this, but admitted that after default he had received a certain amount in stumpage on logs cut and removed from the land. Plaintiff claimed this money was received as a payment on the land. *Held*, that an instruction that defendant's entry on the land was wrongful, if the jury found that payments had been accepted by him after plaintiff was in default, was within the issues.

IDEM.

8. Under such conditions an instruction that the vendor's reëntry was wrongful if the time for completing the payments had been extended beyond the time of such reëntry was within the issues made by the pleadings.

IDEM.

9. Under such conditions an instruction that the right of the vendor to reënter and declare a forfeiture without notice was waived if, after default, the parties had dealt with the land in a manner inconsistent with the theory of a previous forfeiture was proper.

IDEM.

10. Under such conditions, it appearing that after the default, but during the extension of time alleged by the vendee to have been made, the vendor cut and removed from the land a large quantity of timber, a charge that the vendor's reëntry was wrongful, if he had refused to account for moneys which should have been credited to the vendee was proper.

WHEN INTEREST BEGINS ON MONEY HAD AND RECEIVED.

11. Under B. & C. Comp. § 4595, providing for interest on money received to the

use of another, and retained beyond a reasonable time without the owner's consent, interest begins to run upon money had and received from the time it is received, and not from the time of demand therefor.

EFFECT OF CHANGING RATE OF INTEREST ON IMPLIED CONTRACT.

12. In an action for money had and received, where it appears that the statutory rate of interest has been changed after the money was received and before the judgment, interest should be computed to the date of the change at the rate in force when the transaction took place, and thereafter at the new rate to the date of the judgment.

POWER OF SUPREME COURT TO MODIFY A JUDGMENT.

13. Under B. & C. Comp. § 556, conferring on the supreme court power to modify judgments and to order new trials, a judgment based on a verdict may be reversed and the cause remanded with directions to enter a particular judgment in case the facts are undisputed.

From Coos: JAMES W. HAMILTON, Judge.

This is an action by R. A. Graham against C. H. Merchant to recover money paid by plaintiff on a contract which he seeks to rescind in consequence of the defendant's alleged abandonment thereof. It is averred in the complaint, in substance, that on March 21, 1895, a contract was entered into whereby the defendant stipulated to sell and convey to the plaintiff 720 acres of land in Coos County for \$40,000, of which \$5,000 was then advanced, \$3,000 to be paid July 15th of that year, and \$8,000 on March 15th each year for four years thereafter, ending March 15, 1899, with interest, payable annually, at 7 per cent per annum; the taxes imposed upon the land to be paid by the plaintiff, and all improvements placed thereon by him to remain until the final payment; time to be of the essence of the agreement, and, if plaintiff failed to make any of the payments punctually, the defendant should have the right to declare the contract null and void, in which case plaintiff's interest in the premises should cease, without any right of reclamation or compensation for the money paid or improvements made. It is further alleged that the following payments have been made, to wit: March 21, 1895, \$5,000; July 15, 1895, \$3,081.33; March 15, 1896, \$10,240; March 25, 1897, \$9,680; that on the installments of \$8,000 each which matured March 15, 1898, and March 15, 1899, with

interest thereon of \$1,220 and \$560, respectively, there was paid "March 25, 1897, to July 31, 1899, various amounts at different times, aggregating \$7,320, and July 31, 1899, \$1,800, all of which payments were accepted by the defendant under said written contract;" that about July 28, 1899, a parol agreement was entered into whereby defendant was permitted to cut and remove saw logs from said land, crediting plaintiff with stumpage therefor at the rate of \$1 per thousand feet, board measure, on the purchase price of the land; that, in pursuance of the latter agreement, defendant, prior to February 22, 1902, cut and removed 12,000,000 feet of logs of the stumpage value of \$12,000, but neglected to give plaintiff credit for any part thereof; that he then and thereafter wrongfully refused to recognize plaintiff as having any interest in the land, asserting that all his right thereto had been forfeited by his failure to make the required payments, and wrongfully repudiated and rescinded said contracts; and that, in consequence of such conduct, plaintiff, about April 9, 1902, relinquished and surrendered all his interest in and possession of said land to defendant, and demanded repayment of the money received, and interest thereon, amounting to \$51,956.33, but he neglected to pay any part thereof, wherefore judgment is demanded therefor.

The answer admits the execution of said contract, and the payment of the several installments to and including that of \$9,680, March 25, 1897, but denies that plaintiff thereafter, or prior to July 31, 1899, paid \$7,320, or that he paid on the latter day \$1,800, and avers that the following were the only sums received after March 25, 1897, to wit, December 15, 1897, \$1,149.61, and October 8, 1898, \$393.73, and also denies that any of the payments set forth in the complaint were accepted or received by the defendant under said written contract or otherwise, except as therein admitted. He admits, however, that prior to July

28, 1899, in addition to the sums stated in the answer to have been paid, he received \$1,955.07 as stumpage on logs removed from said land, "the same being a part of the substance of said property;" denies that said parol agreement was entered into, or that he cut or removed 12,000,000 feet of logs, of the stumpage value of \$12,000, after July 28, 1899, or any quantity exceeding in value \$7,500. For a first separate defense, it is alleged that on March 21, 1895, the parties entered into another agreement, whereby plaintiff was authorized to cut and remove timber from said land, paying defendant therefor stumpage at \$1 per thousand feet, board measure, and that, in pursuance of said agreement, plaintiff removed from the premises 10,000,000 feet of logs, for which he was to pay stumpage in the sum of \$10,000, but he neglected to do so, and failed to account therefor; that in addition to said sum there was due July 28, 1899, on the purchase price of the land, \$15,964.24, on which day defendant demanded the payment thereof from plaintiff, who promised to pay or adjust the same in two or three days thereafter, but, without attempting to do so, he left the state, abandoned the contract, forfeited all his rights thereunder, and neglected to pay any part of said sums; that about August 1, 1899, in consequence of plaintiff's default, defendant declared said contract null and void, whereupon the premises reverted to and invested in him, and on March 15, 1900, claiming to be the owner of the land, he took possession thereof; and that since July 28, 1899, plaintiff has had no interest therein, nor any legal claim to the money paid on account thereof. For a second defense, the execution of the contract for the purchase of the land, and the payments thereon, as hereinbefore stated in the answer, are admitted, and, as an offset and counterclaim, it is averred that between January 1, 1897, and July 1, 1900, plaintiff cut and removed 10,000,000 feet of logs, for which he promised to pay stumpage

in the sum of \$10,000, but that he had not paid any part thereof, wherefore judgment is demanded therefor.

The reply, having denied that plaintiff cut or removed more than 6,000,000 feet of logs, or that he had not accounted or paid therefor, alleges that after July 28, 1899, the logs received by him from said land did not exceed 2,500,000 feet, of the stumpage value of \$2,500, which is the entire sum he had not paid or accounted for, and denies the other material averments of new matter in the answer. The jury having been impaneled, plaintiff's counsel, in his opening statement, informed them that his client claimed to recover only such payments as were admitted in the answer; and a trial, being had, resulted in a judgment for plaintiff in the sum of \$36,760.55, and the defendant appeals.

CONDITIONALLY AFFIRMED.

For appellant there was an oral argument by *Mr William W. Cotton*, with a brief over the names of *Andrew M. Crawford, Williams, Wood & Linthicum*, and *Cotton, Teal & Minor*, to this effect:

I. By the contract of March 21, 1895, time was expressly declared to be of the essence of the contract. Such an agreement is valid and will be enforced according to its terms: *Frink v. Thomas*, 20 Or. 265, 268 (17 L. R. A. 239, note, 25 Pac. 717); *Clarno v. Grayson*, 30 Or. 111 (46 Pac. 426); *Glock v. Howard & W. Colony Co.* 123 Cal. 1 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); *Missouri River, etc. Ry. Co. v. Brickley*, 21 Kan. 206, 217.

II. The complaint shows that on July 31, 1899, plaintiff was in default, and that the defendant declared a forfeiture. In order to show that this forfeiture was a wrongful act, plaintiff must allege and show some excuse for his default: *Glock v. Howard & W. Colony Co.* 123 Cal. 1 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); *Missouri River, etc. Ry. Co. v. Brickley*, 21 Kan. 206, 217. The only excuse alleged is the making of the parol contract, and the jury

should have been told that this must be established or the verdict must be for defendant, but the court did not do so.

III. The plaintiff knew in December, 1900, that Merchant had declared a forfeiture, and had refused to be further bound by the contract, but the plaintiff did not seek to rescind the contract until April 9, 1902, and did not relinquish possession of the property until that date. This delay prevents rescission: *Scott v. Walton*, 32 Or. 460, 464 (52 Pac. 180); *Vaughn v. Smith*, 34 Or. 54, 57 (55 Pac. 99); *Hogan v. Kyle*, 7 Wash. 595 (35 Pac. 399, 38 Am. St Rep. 910.)

IV. The plaintiff's demand was unliquidated, and therefore the court erred in charging the jury that interest might be allowed thereon: *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354); *Smith v. Turner*, 33 Or. 379 (54 Pac. 166).

V. Plaintiff's claim does not come within the meaning of Section 3587, Hill's Ann. Laws, or Section 4595, B. & C. Comp., and therefore does not bear interest: *State v. Multnomah County*, 13 Or. 287, 295 (10 Pac. 635); *Poppleton v. Jones*, 42 Or. 24 (69 Pac. 922).

VI. In any event, plaintiff was entitled to interest at 8 per cent only to October 14, 1898, when the rate was changed, and it was error to allow interest at that rate to the date of the verdict; and interest should have been computed only from the time a demand was made: *Rio Grande Ry. Co. v. Cross*, 5 Tex. Civ. App. 454 (23 S. W. 529); *White v. Lyons*, 42 Cal. 279; *Reese v. Rutherford*, 90 N. Y. 644; *Stark v. Olney*, 3 Or. 88.

For respondent there was an oral argument by *Mr. Edw. B. Watson*, with a brief over the names of *Watson, Beekman & Watson, A. J. Sherwood*, and *Dolph, Mallory, Simon & Gearin*, to this effect:

(1) Contract provisions for forfeitures are strictly construed; the option to forfeit is *strictissimi juris*: Bishop, Contracts, §§ 417, 418; *Taylor v. Patterson*, 9 La. Ann. 251;

Crane v. Hyde Park, 135 Mass. 147, 149; *Richardson v. Woodlawn Town Co.* 5 Kan. App. 881 (47 Pac. 556, 559).

(2) An option to forfeit is of no effect until it is exercised: *Church v. Ayers*, 5 Cow. 272, 273; *Cartwright v. Gardner*, 5 Cush. 273, 281; *Mason v. Caldwell*, 5 Gillman (Ill.) 196 (48 Am. Dec. 330); *Heald v. Wright*, 75 Ill. 17, *Wilcoxon v. Stitt*, 65 Cal. 596 (4 Pac. 629-632, 52 Am. Rep. 310); *Bohart v. Investment Co.* 49 Kan. 94 (30 Pac. 180, 181); *Chambers v. Anderson*, 51 Kan. 385 (32 Pac. 1098-1100); *Richardson v. Woodlawn Town Co.* 5 Kan. App. 881 (47 Pac. 556-559); *Gaughen v. Kerr*, 99 Iowa, 214 (68 N.W. 694-697); *Johnson v. Ecklund*, 72 Minn. 195 (75 N.W. 14-15).

(3) A valid declaration of forfeiture requires notice: *Merrifield v. Cobleigh*, 4 Cush. 178, 185; *Carney v. Newberry*, 24 Ill. 203; *Eaton v. Schneider*, 185 Ill. 508 (57 N.E. 421); *Boyum v. Johnson*, 8 N.D. 306 (79 N.W. 149); *Mullin v. Bloomer*, 11 Iowa, 360; *Gety v. Sack*, 19 Mo. App. 470; *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.* 100 Mo. 325 (13 S.W. 503).

(4) An option to declare a forfeiture must be promptly exercised or it is waived: *Basse v. Gallegger*, 7 Wis. 448; *Hill v. Grigsby*, 35 Cal. 662; *McCrosky v. Ladd*, 96 Cal. 456 (31 Pac. 558-560); *Hogan v. Kyle*, 7 Wash. 595 (35 Pac. 399-401, 38 Am. St. Rep. 910); *Gaughen v. Kerr*, 99 Iowa, 214 (68 N.W. 694-697); *Linch v. Paris L. & G. Elev. Co.* 80 Tex. 23 (15 S.W. 208).

(5) An option once waived cannot be exercised in any case, without a new default on proper notice and demand: *Soper v. Gabe*, 55 Kan. 646 (41 Pac. 969, 970); *Brentnall v. Marshall*, 10 Kan. App. 488 (63 Pac. 93, 95); *Underwood v. Tew*, 7 Wash. 297 (34 Pac. 1100-1102); *Hogan v. Kyle*, 7 Wash. 595 (35 Pac. 399-402, 38 Am. St. Rep. 910); *Eaton v. Schneider*, 185 Ill. 508 (57 N.E. 421); *Hatton v. Johnson*, 83 Pa. St. 219; *Frink v. Thomas*, 20 Or. 265, 269.

(6) Where the parties have dealt with each other upon

the subject of the contract, after the default, and upon the assumption of its continuance in force, and have changed their positions, as by incurring expenses, or making further payment, the option to declare a forfeiture is finally and conclusively waived and relinquished: *Pomeroy*, Contracts, § 394; *Bishop*, Contracts, §§ 792-797; *Clark v. Jones*, 1 Denio, 516-520 (43 Am. Dec. 706); *Vankirk v. Patterson*, 201 Pa. St. 90 (50 Atl. 966); *Fergusson v. Talcott*, 7 N. D. 183 (73 N.W. 207, 208); *Boyum v. Johnson*, 8 N. D. 306 (79 N.W. 149); *Paulman v. Cheney*, 18 Neb. 395 (25 N.W. 495, 53 Am. Rep. 820); *White v. Atlas Lum. Co.* 49 Neb. 82 (68 N.W. 359-361); *Clark v. Neuman*, 56 Neb. (374 (76 N.W. 892; *Watson v. White*, 152 Ill. 364 (38 N.E. 902-906); *Monson v. Bragdon*, 159 Ill. 61 (42 N.E. 383-385); *Soper v. Gabe*, 55 Kan. 646 (41 Pac. 969-971).

(7) The claim or assertion by the party holding the option that all rights and interests of the other party have been forfeited and lost, without a valid exercise of the option, is itself an act of rescission: *Christy v. Arnold* (Ariz.), 36 Pac. 918-920.

(8) Where a contract is rescinded, payments made thereon, are recoverable as money had and received: *Bishop*, Contracts, §§ 837-842 and 1428-1432; *Clark*, Contracts, §§ 269-271; 2 *Sutherland*, Damages, p. 232; *Drew v. Pedlar*, 87 Cal. 443 (25 Pac. 749-751, 22 Am. St. Rep. 257); *Vankirk v. Patterson*, 201 Pa. St. 90 (50 Atl. 966); *Davis v. Bronson*, 2 N. D. 300 (50 N.W. 836-839, 33 Am. St. Rep. 783, 16 L. R. A. 655); *Stephens v. Wood*, 39 Or. 441 (65 Pac. 602).

(9) In such cases the jury may allow interest on each payment from the time it was made at the legal rate: *Scott v. Sloan*, 3 Tex. Civ. App. 302 (23 S.W. 42); *Evans v. Bentley*, 9 Tex. Civ. App. 112 (29 S.W. 497, 499); *Williamson v. Johnson*, 62 Vt. 378 (9 L.R.A. 277-279, 22 Am. Rep. 117, 20 Atl. 279); *Gates v. Parmly*, 93 Wis. 294 (67

N. W. 739); *McKee v. Phoenix Ins. Co.* 28 Mo. 383 (75 Am. Dec. 129); *Tupy v. Kocourek*, 66 Ark. 433 (51 S. W. 69); *Thompson v. New York Life Ins. Co.* 21 Or. 466, 488-490 (28 Pac. 628).

(10) The complaint is based on rescission, and all its allegations must be construed in harmony with that theory: Phillips, Code Pl. §§ 351-354; *Evansville & Rich. R. Co. v. Barnes*, 137 Ind. 306 (36 N. E. 1092); *Aetna Pow. Co. v. Hildebrand*, 137 Ind. 462 (45 Am. St. Rep. 194, 37 N. E. 136); *Newell v. Nicholson*, 17 Mont. 389 (43 Pac. 180-182).

(11) But if there was any error in the allowance of the item of \$1,955.07 received by Merchant on July 28, 1899, or in the allowance of interest at too high a rate, which is properly before the court, it will only require a reduction of the judgment by amounts susceptible of ready calculation, and which the respondent should have the opportunity to remit, and avoid reversal, under the settled practice: *Mackey v. Olssen*, 12 Or. 429 (8 Pac. 357); *Fiore v. Ladd*, 29 Or. 528 (46 Pac. 144); *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520).

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing terms, delivered the opinion.

1. It is contended by defendant's counsel that the parol agreement was the only fact alleged as an excuse to prevent a forfeiture of plaintiff's rights under the contract, and, this averment having been denied, the court erred in not instructing the jury, when so requested, that the burden was cast upon the plaintiff to prove by a preponderance of the evidence that such agreement had been entered into, and that, unless they so found, their verdict should be for the defendant. The defendant having alleged that he had been paid on account of the last two installments, the following sums, to wit, December 15, 1897, \$1,149.61, and October 9, 1898, \$393.73, and in addition

thereto had received prior to July 28, 1899, \$1,955.07, as stumpage, and this averment being accepted as true by plaintiff's counsel in his statement of the case to the jury, another issue clearly stated in the pleadings remained — as to whether or not the last payment was accepted by the defendant upon the purchase price. The answer admits that \$1,955.07 was received prior to July 28, 1899, and, by adopting the ordinary rule that a pleading will be construed most strongly against the pleader (*Pursel v. Deal*, 16 Or. 295, 18 Pac. 461; *Kohn v. Hinshaw*, 17 Or. 308, 20 Pac. 629), it must be inferred that this sum was received after March 15, 1899, when the last installment of the purchase price and interest matured.

2. Time was expressly declared to be of the essence of the contract, and the defendant having the option, upon a default in the payment of any installment of the purchase price, to declare a forfeiture, such stipulation is valid, and will be enforced according to its terms, when the right has been duly exercised: *Frink v. Thomas*, 20 Or. 265, 268 (25 Pac. 717, 12 L. R. A. 239); *Clarno v. Grayson*, 30 Or. 111 (46 Pac. 426); *Missouri, etc. Ry. Co. v. Brickley*, 21 Kan. 275.

3. A forfeiture clause is inserted in a contract to convey real property for the advantage of the vendor, and, as a competent party may waive any provision that is beneficial to him, a mere option to declare a forfeiture is not self-executing, and hence does not become operative until exercised: *Cartwright v. Gardner*, 5 Cush. 273; *Heald v. Wright*, 75 Ill. 17; *Bohart v. Republic Inv. Co.* 49 Kan. 94 (30 Pac. 180); *Chambers v. Anderson*, 51 Kan. 385 (32 Pac. 1098).

4. When a vendor abandons his contract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to recover what he has paid thereon, as money had and received :

Lyon v. Annable, 4 Conn. 350; *McKinnon v. Vollmar*, 75 Wis. 82 (43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178); *Glock v. Howard & W. Colony Co.* 123 Cal. 1 (55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17). This theory was adopted by plaintiff's counsel, who maintain that if the money received by the defendant after March 15, 1899, was accepted by him as a payment on the purchase price of the land, he could not thereafter declare a forfeiture, except upon a demand and notice, and, this being so, no error was committed in refusing to give the instruction requested. If the money so received as stumpage was accepted on the purchase price of the land after the maturity of the final payment, the defendant must have elected to consider the contract in force.

5. It remains to be seen whether, after such election, he could rescind the contract without giving notice. "The law," says Mr. Justice Wood, in *Higby v. Whittaker*, 8 Ohio, 198, "requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform, by him who would resist a rescission of his contract." In *Mullin v. Bloomer*, 11 Iowa, 360, it is held that a vendee cannot rescind a contract for the conveyance of real estate without the performance of some act which will give the vendor notice of his intention and put him upon his guard. In *Eaton v. Schneider*, 185 Ill. 508 (57 N. E. 421), in a suit for specific performance of a bond for a deed, which provided that time should be of the essence of the contract, it appeared that the vendor having given the vendee two days extension after maturity to adjust the matter, and three weeks having elapsed before the vendor indicated any intention of declaring a forfeiture, it was held that such indulgence

operated as a suspension of the vendor's right to declare a forfeiture without notice. In *Gaughen v. Kerr*, 99 Iowa, 214 (68 N. W. 694), it was held that a failure to pay the installments when they matured did not *ipso facto* work a forfeiture of a contract under a clause conferring an option to do so, but merely gave a right to declare a forfeiture, which was waived unless exercised promptly. In *Eaton v. Schneider*, 185 Ill. 508 (57 N. E. 421), it is held that a forfeiture cannot be declared after waiver, except upon giving notice. To the same effect is *Basse v. Gallegger*, 7 Wis. 448 (76 Am. Dec. 225), where it is held that a reservation, in a contract, of an option to declare it void for a failure to perform its conditions, to be of any effect, must be exercised by election at the time of the default. In *Watson v. White*, 152 Ill. 364 (38 N. E. 902), it was held that, where time is stated to be of the essence of a contract to convey land, if both parties, by a mutual course of conduct, treat the time clause as waived or suspended, one of them cannot suddenly insist upon forfeiture, but must, in order then to avail himself of the time clause, give reasonable, definite, and specific notice of his changed intention. When a vendor waives the stipulation of a contract prescribing the time of its performance, he cannot rescind without giving the vendee reasonable notice to comply with his part of the agreement: *Falls v. Carpenter* 28 Am. Dec. 592; *Cummings v. Rogers*, 36 Minn. 317 (30 N. W. 892); *Harris v. Troup*, 8 Paige, *423. To the same effect, see *Merrifield v. Cobleigh*, 4 Cush. 178; *Monson v. Bragdon*, 159 Ill. 61 (42 N. E. 383); *King v. Radeke*, 175 Ill. 72 (51 N. E. 698); *Boyum v. Johnson*, 8 N. D. 306 (79 N. W. 149). Under the rule announced in these cases, if the sum of \$1,955.07 received by the defendant after March 15, 1899, on account of stumpage, was accepted by him as a payment on the purchase price of the land, as is alleged in the complaint, the plaintiff's default was thereby waived, and the

defendant's right to declare a forfeiture could not thereafter be exercised without a demand and reasonable notice. The existence of the parol agreement not being the only issue involved, no error was committed in refusing to give the instruction requested.

6. The court, however, practically charged the jury as desired, for in the sixth instruction they were told that the burden of proof was upon the plaintiff to show by a preponderance of the testimony all the affirmative allegations of the complaint, and that he was required to prove by the same degree of evidence that a parol contract had been entered into as alleged. The jury, in the fifth and twelfth instructions, were told, in substance, that, the alleged parol agreement having been relied upon by the plaintiff to show an extension of time for the performance of the terms of the original contract, the burden of proof rested upon him to show that there was such an extension, and that the defendant had wrongfully disregarded his rights under the contract. They were not expressly charged, however, that, unless they should find from the evidence that the parol agreement had been entered into, their verdict should be for the defendant; but as they were told in the eleventh instruction that if plaintiff made default in the payments agreed upon, and, while such default continued, defendant demanded payment of the remainder due under the contract, and, the same not being paid, retook possession of the premises, and exercised acts of control over them, plaintiff was not entitled to recover the moneys paid, and their verdict should be for the defendant, it was, in effect, the giving of the instruction requested.

7. The defendant's counsel, having excepted to the following part of the charge, contend that the court erred in giving it, to wit:

"(13) If you should find from the testimony, as you have a right to, under the circumstances in the case, as to whether

or not payments were accepted afterwards by the defendant, and the other circumstances of the case tending upon that point; also the testimony which has been introduced before you— If you should find that there was an extension of time, or that the parties dealt with it afterwards (that is, after the time for the final payment had expired,) and defendant did not then exercise his right of option to forfeiture under the terms of the written contract, or by refusing to give an account of the moneys which should have been credited to plaintiff, and took possession of the property, without giving him reasonable notice or demand, that would be a wrongful act in disregarding or rescinding the rights of plaintiff, and plaintiff would be entitled to bring action for the recovery of the purchase price which he had paid.”

An examination of the language complained of will show that the court instructed the jury, in effect, that plaintiff was entitled to recover the money paid, if in disregarding or rescinding his rights the defendant acted wrongfully, and that his conduct in this respect was unjust, if they found either (1) that payments had been accepted by him after March 15, 1899; (2) that the time for the payment of the purchase price had been extended by entering into the alleged parol agreement; (3) that the parties had dealt with the property after March 15, 1899, in a manner inconsistent with the theory of a declaration of forfeiture; or (4) that the defendant had refused to account for the moneys which should have been credited to plaintiff.

Considering these grounds in their respective order, it will be remembered the answer admits that the defendant received for stumpage on logs taken from the land prior to July 28, 1899, \$1,955.07, and subsequent thereto, \$7,500, and these sums are undoubtedly the “payments” referred to by the court. The plaintiff’s theory is that the money received prior to the time stated was accepted as a payment on the purchase price of the land, thereby waiving his default, and that the sum received after July 28,

1899, was obtained in pursuance of the parol agreement, while the defendant's theory is that having declared the original contract forfeited about August 1, 1899, the land reverted to him, together with the timber thereon, and all sums of money derived from the stumpage on logs cut and removed therefrom. The complaint having alleged that about July 31, 1899, plaintiff paid \$1,800, which sum was "accepted and received by the defendant under said written contract," and this averment being denied in the answer, which admitted that prior to July 28, 1899, the defendant received \$1,955.07 in stumpage on logs cut and removed from the land, and this averment being accepted by plaintiff's counsel as correct, we are satisfied that it was intended thereby that the sum so admitted as having been received must have been in lieu of the \$1,800 alleged to have been paid about July 31, 1899, thereby rendering the first ground of the instruction clearly within the issues.

8. The extension of the time in which to pay the purchase price of the land, alleged to have been secured by entering into the parol agreement, as stated in the second ground of the instruction, is also within the issues. It will be remembered that, after defendant's alleged declaration of forfeiture, plaintiff avers that he cut and removed from the land 2,500,000 feet of logs, for which he was to pay the defendant \$2,500. The testimony shows that defendant lived near the land in question, and, if these logs were cut and removed by plaintiff as he alleges, the defendant must have been cognizant thereof; and if, upon the discovery of what would otherwise have been a trespass, he did not then exercise his right to declare a forfeiture, it was a circumstance from which the jury might reasonably infer that the parties dealt with the land after the maturity of the final payment of the purchase price as they had prior thereto. The deposition of the plaintiff is to the effect that after August 1, 1899, when it is alleged

in the answer that the forfeiture was declared, relying upon the faith of the parol agreement, he extended a line of railroad on the land in question about 1,000 feet, over which he transported logs taken from the premises, and in this respect he is corroborated by the testimony of other witnesses. This work is inconsistent with defendant's theory, and having known, as he must, that this improvement was being made, if he did not then protest against it, it was a circumstance from which the jury might reasonably infer that the forfeiture had not been declared.

9. The third ground stated in the instruction is not expressly mentioned in the pleadings, but it is so nearly related thereto that it may be said to be fairly within the issues.

10. The defendant alleged that after August 1, 1899, he cut and removed from the land logs of the value of \$7,500, and, if the parol contract had been entered into, it was incumbent upon him to account to plaintiff therefor; but if, neglecting to do so, he took possession of the property without giving plaintiff reasonable notice or demand, his act in this respect was wrongful, as stated in the fourth ground of the instruction, which was within the issues. The instruction, in our opinion, is germane to the issues, and no error was committed in giving it.

11. The court instructed the jury, in effect, that, if plaintiff was entitled to recover the money paid by him, he had a right to interest thereon at 8 per cent from the time such payments were made until September 12, 1902, on the sums paid prior to October 14, 1898, and 6 per cent on all sums paid thereafter. The defendant's counsel, having excepted to this part of the charge, maintain that, if plaintiff was entitled to any interest, he could only recover 6 per cent upon the sums so paid upon demand therefor after the rescission of the contract. The statute, so far as applicable to the case at bar, is as follows: "The rate of in-

terest in this state shall be six per centum per annum, and no more, * * on money received to the use of another and retained beyond a reasonable time without the owner's consent, expressed or implied": B. & C. Comp. § 4595. It is argued that interest does not begin to run upon money had and received to the use of another until demand for its payment, and, its retention thereafter being without the owner's consent, the statute allows interest from such demand. In the absence of an express agreement of the parties respecting the rate to be paid for the use of money, the right to recover interest must be found in the statute conferring it. Thus, as was said in *Leete v. Pacific M. & M. Co.* (C. C.) 89 Fed. 480: "When a man receives money that belongs to another, he ought, on general principles of equity and justice, to pay the legal interest from the time of the demand for the payment thereof; but, if the statute does not allow it, interest should not be given, except from the date of the entry of the judgment." We think our statute was designed to provide for the payment of interest in cases of this character from the time the money was received to the use of another, and not from the date of the demand, for, the contract having been abandoned by what the jury found to be a wrongful act of the defendant, thereby authorizing the plaintiff to rescind, the effect of the conduct of the parties is as though no contract had ever been entered into, and, this being so, the money was retained without the plaintiff's implied consent, which entitles him, in our opinion, to interest from the time the money was paid.

12. The question now to be considered is the rate recoverable. The rule is settled in this state that contracts for the payment of money, stipulating also for the payment of legal interest, or upon which the law provides for the payment thereof, will draw the rate prescribed or in force when the contract is entered into, until final payment,

notwithstanding an intermediate change in the law: *Seton v. Hoyt*, 34 Or. 266 (55 Pac. 967, 43 L. R. A. 634, 75 Am. St. Rep. 641); *Shipley v. Hacheney*, 34 Or. 303 (55 Pac. 971); *Brauer v. Portland*, 35 Or. 471 (57 Pac. 546); *Monteith v. Parker*, 36 Or. 170 (59 Pac. 192); *Close v. Riddle*, 40 Or. 592 (67 Pac. 932, 91 Am. St. Rep. 580, and note). In each of these cases a contract for the direct payment of money was involved, but in the case at bar there was no express agreement to repay the sums received. The law, however, creates an implied promise to repay money received to the use of another, and attaches to the obligation a penalty for retaining it, and the damages thus awarded are measured by the legal rate of interest prescribed by statute: B. & C. Comp. § 4595. In *Aguirre v. Packard*, 14 Cal. 171 (73 Am. Dec. 645), the rule was announced, and since adopted in this state, that, notwithstanding an amendment of the statute, prescribing a different rate, interest follows a contract according to the law in force at the time it was entered into. In *White v. Lyons*, 42 Cal. 279, the defendant having received money to the plaintiff's use, judgment was rendered against him therefor, with legal interest at the rate prescribed at the time of the conversion. The statute having been amended thereafter, and before judgment, reducing the legal rate from ten to seven per cent per annum, it was held that the interest was improperly computed, the court saying: "In the absence of a contract for interest, it is only allowed as damages for a failure to pay the money due (*Fake v. Eddy's Ex'r*, 15 Wend. 80); and it is competent for the legislature to fix the amount which shall be recovered." So, too, in *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454 (23 S. W. 529), in an action to recover for goods lost *in transitu*, it was held that the shipper was entitled to the value of the goods, with interest at eight per cent per annum until the law changing the legal rate to

six per cent went into effect, and with interest thereafter at the latter rate until the time judgment was entered.

These cases proceed upon the theory that, no contract having existed for the payment of the principal, the party injured by the wrongful retention of his money was entitled only to the current rate of interest, which was subject to fluctuation according to legislative fiat. We are satisfied that this is the rule that should be applied in the case at bar, and, as there is no dispute as to the time or amounts of the payments made by the plaintiff, the interest should be computed at 8 per cent per annum on all moneys from the time they were received until October 14, 1898, and at 6 per cent on the same sums from that time until September 12, 1902, when the judgment was rendered. The payments are as follows: March 21, 1895, \$5,000; interest to October 14, 1898, at 8 per cent, \$1,425.53. July 15, 1895, \$3,081.33; interest, \$800.43. March 15, 1896, \$10,240; interest, \$2,113.98. March 25, 1897, \$9,680; interest, \$1,202.46. December 15, 1897, \$1,149.61; interest, \$76.38. October 8, 1898, \$393.73; interest, 52 cents. Total payments made prior to October 14, 1898, \$29,544.67; interest thereon until that date, \$5,619.30; interest on said payments from that date until September 12, 1902, at 6 per cent, \$6,933.11. Total due, \$42,097.08. The answer admits that prior to July 28, 1899, the defendant received the sum of \$1,955.07 as stumpage on logs which it is alleged were a part of the substance of the estate, and it appears that judgment was rendered in plaintiff's favor for this sum, and interest from that date. It would seem that, the land having reverted to the defendant upon the plaintiff's rescission of the contract, the logs, which were an incident to the premises, became the defendant's property also, necessarily including the stumpage thereon; but this sum having been treated by the parties at the trial as a payment made by the plaintiff to the defendant, and no

exception thereto having been taken, it cannot now be disturbed. There will then be added to the total sum \$1,955.07, and interest thereon at 6 per cent from July 28, 1899, to September 12, 1902, or \$366.23; making in all \$44,418.38.

13. The jury allowed the defendant's counterclaim of \$10,000, and the judgment, having been rendered for \$36,760.55, is \$2,342.17 in excess of the sum due the plaintiff, according to his theory of the case; and this presents the question whether the cause should be sent back for a new trial, or with directions to modify the judgment. The appellate court possesses power to modify judgments, and may, if necessary and proper, order a new trial: *B. & C. Comp. § 556*. In construing this statute, it has been repeatedly held that where the facts are apparent from an inspection of the transcript, showing that a judgment is excessive in a certain sum, and no dispute exists concerning such facts, the court may remand the cause, with directions to enter a particular judgment, or send it back for a new trial: *Mackey v. Olssen*, 12 Or. 429 (8 Pac. 357); *Merchants' Nat. Bank v. Pope*, 19 Or. 35 (26 Pac. 622); *Nordine v. Shirley*, 24 Or. 250 (33 Pac. 379); *Grant v. Paddock*, 30 Or. 312 (47 Pac. 712); *Liebe v. Nicolai*, 30 Or. 364 (48 Pac. 172); *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520); *Pacific Lum. Co. v. Prescott*, 40 Or. 374 (67 Pac. 207). In conformity with this rule, if plaintiff, within ten days, remits the sum of \$2,342.17, the cause will be remanded to the court below, with directions to enter judgment in his favor for \$34,418.38, with interest thereon at 6 per cent per annum since September 12, 1902—the defendant to have his costs and disbursements in this court upon the appeal; but, if this sum is not remitted within the time prescribed, the judgment will be reversed and a new trial ordered.

CONDITIONALLY AFFIRMED.

Decided 8 June, rehearing denied 3 August, 1903.

HERRING-MARVIN CO. v. SMITH.

[72 Pac. 704, 73 Pac. 340.]

CONSTRUCTION OF COMPLAINT AFTER ANSWER.

1. Complaints will be construed more favorably to the pleader after answer than before. For instance, a contract was printed on a form headed "Herring-Hall-Marvin Co.," but was addressed "Hall's Safe & Lock Works," and the latter was referred to in the body of the instrument as the contracting party. The complaint alleged that the contract was made with the Herring Co. *Heid*, that after answer the complaint will be considered as inferentially alleging that the Herring Co. and the Hall Works are the same organization.

CONSTRUCTION OF CONTRACT—LEASE OR CONDITIONAL SALE.*

2. A contract between the owner of a chattel and another person, providing that such person shall have possession of the chattel; that he shall pay to the owner for such chattel a stated sum in specified payments as "rent"; that when this shall be done the owner will sell the chattel to such person for one dollar; that if default shall be made in the payment of the reserved rent, or in the performance of other specified conditions, the owner may retake such chattel, retain all rent then paid, and terminate the "lease"; that such other person shall hold possession of the chattel and keep it insured; and pay interest on the overdue payments, is a conditional sale and not a lease.

BROKEN CONDITIONAL SALE CONTRACT—RIGHT OF VENDOR.

3. Where a conditional sale contract has been broken by the vendee the vendor may waive his right to recover possession of the property, and sue for the purchase price, treating the contract as executed.

PLEADING—IMPLIED ADMISSION BY IRRELEVANT DENIAL.

4. Where a complaint alleged that plaintiff was incorporated in New Jersey, and the answer denied that plaintiff was incorporated in California, the incorporation in New Jersey was admitted.

RESCISSION OF EXECUTORY CONTRACT—REMEDY OF OTHER PARTY.

5. Either party to an executory contract may retire from it, if he chooses, but by so doing he subjects himself to an action for damages by the other party. In such a case of course no action can be brought on the contract itself.

SALES—EFFECT OF DELIVERY TO CARRIER.

6. A contract of conditional sale, providing for shipment by the vendor at a distant point, "via best route," stipulating for safe delivery on cars at the city where the purchaser lived, at which time he should repay the vendor the freight bill, is a contract to deliver to the buyer at the place where he lived, and a delivery to a carrier for shipment is not a delivery to the buyer.

ISSUE APPEARING OF RECORD—NEED OF ALL THE TESTIMONY.

7. Where, on appeal, it appears from plaintiff's own showing in the bill of exceptions, taken in connection with the pleadings and the contract involved, that

* NOTE.—The notes to the following named cases contain many authorities discussing the difference between bailments and sales: *Hineman v. Matthews*, 10 L. R. A. 233; *Tufts v. D'Archambal*, 24 Am. St. Rep. 79, 84, 12 L. R. A. 416, 447; *Weinstein v. Freyer*, 12 L. R. A. 700, 703; *Andrews & Co. v. Colorado Sav. Bank*, 46 Am. St. Rep. 291, 295-298.

See, also, extended note, Rights and Liabilities of Vendor and Purchaser by Conditional Sale on Default of Payment, in 32 L. R. A. 455-471.—REPORTER.

he is not entitled to recover, the ruling of the trial court on a motion for a nonsuit may be reviewed, although only part of the evidence appears in the record, for enough appears to show the basis of plaintiff's claim.

WAIVING OBJECTION THAT MOTION FOR NONSUIT IS DEFECTIVE.

8. Where, on appeal, the correctness of a ruling as to a nonsuit is tried out on the merits, an objection on rehearing that the motion for the nonsuit was insufficient because it did not state the specific ground on which it was based, will not be entertained, as it was waived by not being urged at the proper time.

From Union: ROBERT EAKIN, Judge.

The complaint herein sets up, in substance, that plaintiff, the Herring-Hall-Marvin Co., is a corporation organized under the laws of New Jersey; that on the first day of April, 1901, defendant made, executed, and delivered to plaintiff an instrument in writing, which is made a part thereof; that on or about the fifth of June, 1901, the plaintiff shipped the safe mentioned therein, and consigned the same to defendant at the town of La Grande, Oregon, *via* best route, and that it arrived at its destination on the twentieth of June; that the freight thereon from San Francisco, California, to La Grande, Oregon, was \$78.65, which defendant refused to pay; that plaintiff complied with all the conditions of said instrument upon its part to be performed, and that there is now due from defendant to plaintiff the said sum of \$78.65, and one sixth of the purchase price of said safe, namely, \$53.50, and interest thereon at the rate of ten per cent per annum from July 20, 1901. This is followed by the usual prayer for judgment. The following is a copy of the instrument upon which the complaint is based:

HERRING, HALL, MARVIN CO.

La Grande, Oregon, April 1, 1901.

Hall's Safe and Lock Works, San Francisco.

Please ship as directed one number 185 safe of the dimensions and plans of interior as specified on back of this order, marked to James R. Smith, Town of La Grande, County of Union, and State of Oregon, *via* best route, for which I agree to pay to your order the sum of \$321.00,

gold coin, rent as follows: Fgt. on arrival, and balance in six equal payments of 30 days each, to date from arrival of safe in La Grande, or 5 per cent said balance in 30 days from arrival, for safe delivery on cars at La Grande, Oregon.

It is agreed that the undersigned shall not permit the safe to be removed from the place above mentioned, nor injured, nor taken by any other person or process, and shall pay the monthly rent each month when due. At the end of the time above mentioned, if the undersigned shall have paid the monthly rent each month when due, and kept the above conditions, the company will sell the undersigned the safe for one dollar. Until then it shall remain absolutely the company's property. If any of the above conditions are violated, or any month's rent shall remain unpaid for thirty days after it becomes due, the company or its agents may at any time thereafter, without previous demand, retake possession of the safe, retain all rent paid, and terminate this *lease*; and the undersigned shall have no claim on the company or safe. All moneys to be paid to the company at its office in San Francisco. The undersigned agrees to keep the above safe insured for its value in a good company at his own expense, and in event of fire this contract shall be a lien upon said insurance policy for the amount that may at that time be due upon this contract. In the event of failure to make payments when due, interest at the rate of ten per cent per annum shall be paid upon such deferred payments from the time when due until paid. And if for any cause Hall's Safe and Lock Works shall bring suit to recover possession of said safe in accordance with the terms of this contract, the undersigned agrees to pay Atty's fees and costs of court. It is understood and agreed by the undersigned that all the conditions of this order are contained in the above, that no verbal statements or agreements with the agent shall bind the Hall's Safe and Lock Works to anything not written in the body of this order, and that this order is not subject to countermand.

JAMES R. SMITH.

The defendant interposed a demurrer to the complaint, which being overruled, he answered, denying that plaintiff

was a corporation organized under the laws of California, and all other allegations of the complaint, and, for a separate defense, setting up, in effect, that the order or contract was for a safe of a different make and quality from the one sought to be delivered, and that on account of the delay in furnishing the safe contracted for he countermanded the order. A trial was had, resulting in a verdict and judgment for plaintiff, from which defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. C. H. Finn*.

For respondent there was a brief and an oral argument by *Mr. J. W. Knowles*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

The sufficiency of the complaint is challenged by objections to the introduction of evidence intended to establish defendant's liability. It is unnecessary to take note of the demurrer, as the act of answering over brings us to this point, and the complaint must be tested by its sufficiency after verdict.

1. The first criticism is that the contract sued on, as shown by the complaint, is not a contract with the plaintiff, but with the Hall's Safe & Lock Works, a different and distinct concern. There was a tendency in the evidence, however, to show that plaintiff, or the corporation designated as the Herring-Hall-Marvin Company, is the parent concern, and that Hall's Safe & Lock Works is the name given to a sort of repair shop located at San Francisco, which is but a branch of the plaintiff's, without separate organization, and that the order was given to the plaintiff in the name of the latter. This fact, if it be such, which was a matter for the jury to determine, might have been stated more explicitly in the complaint, and, being

so stated, it would undoubtedly contain a good cause of action in favor of the plaintiff. But there is an allegation that defendant made, executed, and delivered the instrument to plaintiff, which, by taking note of the manner in which it is addressed, is inferentially an allegation that the Hall's Safe & Lock Works is the same organization as the plaintiff, and we think is sufficient after answer.

2. The question of larger moment is whether the contract is one of leasing or a sale. The court treated it as a conditional sale, and the trial was conducted upon that theory. In this the defendant assigns error. If a lease, no title to the property passed to the defendant, and plaintiff pursued an inapt procedure in causing it to be attached and procuring an order in the judgment for its sale. If a sale, we have incidentally to determine whether plaintiff has adopted an appropriate form of action under its theory of the case. It is of but little consequence what name may be given to the paper, whether lease or sale. Its real character is to be determined by the legal effect of its conditions, that is, the ruling or prevailing intention of the parties, to be gathered from the language employed. The form of the instrument is not controlling. There is a direct undertaking on the part of the defendant to pay to the order of the plaintiff \$321, denominated "rent," in six equal payments of thirty days each. At the expiration of the time, if the monthly rent has been paid, the company agrees for \$1 to sell; but it is further provided that, if any month's rent shall remain unpaid for thirty days after it becomes due, the company may retake possession, retain the rent paid, and terminate the lease, and that the defendant shall thenceforth have no claim on the company or safe; that the defendant shall keep the property insured for its value at his own expense, and in the event of fire the contract shall be a lien upon the policy for the amount

that may at the time be due, and shall pay interest upon all deferred payments.

Now, if a lease, why is there a definite sum named to be paid eventually, and why is it stipulated that when said sum is paid a sale will be made for the nominal sum of \$1? A leasing can be accomplished by much less indirection than this. Again, if a lease, why the stipulation that if any rent shall remain unpaid for thirty days the company may retake possession, retain the rent, and terminate the lease, and that thereafter the defendant shall have no claim upon the company or the safe? In an ordinary leasing, and one suggested by direct business methods, the rent is a consideration that belongs to the lessor as of course, and no stipulation that he may retain it is necessary. Nor was there the least necessity for the provision that defendant should thenceforth have no claim upon the property. And, further, a lessee ordinarily can have no insurable interest in the subject of the lease, as he has absolutely no property therein. This contract, however, treats him as acquiring an interest in proportion as the amount paid stands to that agreed to be paid. These provisions are wholly inconsistent with the idea of a lease, but of themselves, and especially when read in connection with the other stipulations entered into by the parties with reference to the subject of their dealings, clearly manifest an intention to effect a sale, not absolute and irrevocable, but conditional, the vendor giving possession, but reserving the title until the consideration or purchase price is fully paid. Nor can the terms "rent," "monthly rent," and "lease" operate to mask the purpose, and make the contract anything else than such as the real and true intentment of the parties has made it. This view is not one of first impression with this court. In *Singer Mfg. Co. v. Graham*, 8 Or. 17 (34 Am. Rep. 572), the company, through its agent, took from one Morgan what purported on its

face to be a contract of hiring or leasing of a sewing machine, at \$10 per month, but stipulated with Morgan that when \$65, the value of the machine, was paid, it should belong to the latter. Speaking of this contract, the court, through Mr. Chief Justice KELLY, said: "It was only a conditional sale, accompanied by the possession, which Morgan was permitted to retain until the condition was broken." Other contracts of a similar nature have been so construed by this court: *Rosendorf v. Baker*, 8 Or. 240; *Schneider v. Lee*, 33 Or. 578 (17 Pac. 269). Authorities elsewhere are abundant in support of this construction: *Quinn v. Parke & Lacy Mach. Co.* 5 Wash. 276 (31 Pac. 866); *Loomis v. Bragg*, 50 Conn. 228 (47 Am. Rep. 638); *Hine v. Roberts*, 48 Conn. 267 (40 Am. Rep. 170); *Singer Mfg. Co. v. Cole*, 4 Lea, 439 (40 Am. Rep. 20); *Sumner v. Cottey*, 71 Mo. 121; *Singer Sewing Mach. Co. v. Holcomb*, 40 Iowa, 33; *Murch v. Wright*, 46 Ill. 487 (95 Am. Dec. 455); *Lucas v. Campbell*, 88 Ill. 447. We hold, therefore, that the trial court was not in error in treating the contract in controversy as a conditional sale, but it was in its nature executory until performance.

3. Now, as to the form of the action brought in the case at bar. The common, and perhaps the most natural, remedy of the seller upon default, is to declare the buyer's right under the contract forfeited, and take proceedings to recover the property. But this is not the only remedy. Where a party has agreed to purchase and pay for the property, and has or is entitled to possession until default, the seller may have choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price: 1 Mechem, Sales, §§ 613-615, 619; *Bailey v. Hervey*, 135 Mass. 172; *McRea v. Merrifield*, 48 Ark. 160 (2 S. W. 780); *Smith v. Barber*, 153 Ind. 322 (53 N. E. 1014). This disposes of counsel's first proposition.

4. The second pertains to defendant's motion for a non-suit. In this three contentions are made, of which we will examine two. It is argued: First, that there is no proof of plaintiff's organization under the laws of California. The complaint shows an allegation of incorporation in New Jersey. The answer is a denial of plaintiff's organization in California. The organization in New Jersey is therefore admitted.

5. It is argued: Second, that there was no proof of a delivery of the safe on board a car at La Grande. Plaintiff's testimony shows that the safe was shipped from Hamilton, Ohio, on June 5, 1901, and that defendant countermanded his order or contract by wire on June 12th. According to an allegation in the complaint, the safe arrived in La Grande, Oregon, on June 20th, so that by plaintiff's own showing there was a countermand of the order before the arrival of the safe at its destination, and the question is whether the testimony will support the cause of action presented by the complaint. Where a contract is executory, a party has the power, if he choose, to interdict performance by an explicit direction to that effect, and in such case he subjects himself to an action sounding in damages for a breach of the contract, and none will lie on the contract itself as for sale and delivery: 2 Mechem, Sales, §§ 1091, 1092; *Unexcelled Fire-Work Co. v. Polites*, 130 Pa. 536 (18 Atl. 1058, 17 Am. St. Rep. 788); *Collins v. Delaporte*, 115 Mass. 159; *Butler v. Butler*, 77 N. Y. 472 (33 Am. Rep. 648); *Moline Scale Co. v. Beed*, 52 Iowa, 307 (3 N. W. 96, 35 Am. Rep. 272); *Danforth v. Walker*, 37 Vt. 239, 40 Vt. 257; *Clark v. Marsiglia*, 1 Denio, 317 (43 Am. Dec. 670); *Gibbons v. Bente*, 51 Minn. 499 (53 N. W. 756, 22 L. R. A. 80).

6. There is a stipulation in the contract "for safe delivery on cars at La Grande." The trial court was of the opinion, however, that, from a survey of the whole instru-

ment, a delivery to defendant was effected by delivery to the carrier at Hamilton, Ohio, to be shipped to defendant at La Grande, and that the contract became executed so far as the plaintiff was concerned; hence that he was entitled to recover under the action as brought. We cannot accede to this construction. The writing directs the plaintiff to ship "via best route," it is true, but plaintiff necessarily had to pay the freight in the first instance, for defendant's undertaking is to pay freight on arrival, not to the carrier, but to plaintiff, and the undertaking is "for safe delivery on cars at La Grande," thus indicating plaintiff's responsibility for safe transportation of the property to destination. All this goes to show unmistakably that the carrier became the agent of the plaintiff, and not of the defendant, and that a delivery could not be effected until the plaintiff had fully performed by having the safe on the car at La Grande. Mr. Benjamin says: "Where the vendor is bound to send the goods to the purchaser, the rule is well established * * that delivery to a common carrier, *a fortiori*, to one specially designated by the purchaser, is a delivery to the purchaser himself; the carrier being, in contemplation of law in such cases, the bailee of the person to whom, not by whom, the goods are sent; the latter, when employing the carrier, being regarded as the agent of the former for that purpose. If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent": Benjamin, Sales (7 ed.), § 693. This doctrine finds support in 21 Am. & Eng. Ency. Law (1 ed.), 528-530; *Dunlop v. Lambert*, C. & F. R. *600; *Devine v. Edwards*, 101 Ill. 138; *Murray v. Nichols Mfg. Co.* (City Ct. N. Y.) 11 N. Y. Supp. 734; *Miller v. Sumerset C. P. & Lum. Co.* 21 Ky. Law Rep. 424 (51 S. W. 615). No delivery of the safe was had, therefore, prior to defendant's countermand or renunciation of the order or con-

tract. While a delivery had been made by plaintiff to the carrier before the countermand, it was only a delivery to its own agent to carry out its undertaking to deliver on a car at La Grande, and the contract was still in an executory state and unfulfilled, so far as it was concerned, leaving the defendant free to interdict further performance. Plaintiff's action, therefore, could not be for the purchase price, but only for special damages for a refusal to receive the safe on its arrival on the car at La Grande. The complaint not having been drawn nor the action prosecuted upon this basis, the nonsuit should have been allowed. The judgment of this court will be, therefore, that the judgment of the trial court be reversed and the cause remanded, with directions to allow the nonsuit. REVERSED.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

It is urged by a petition for rehearing on the part of the plaintiff that this court ought not to have considered the motion for a nonsuit, because (1) the testimony is not all contained in the bill of exceptions, and (2) it does not state the specific grounds upon which it is based.

7. Answering the first reason assigned, it is only necessary to state that by plaintiff's own showing, which appears in the bill of exceptions, when read in connection with the pleadings and the contract, it is not entitled to recover. In such case it would be a matter of supererogation to bring up the whole evidence, because it could show no different state of facts which would in any way affect the company.

8. As to the second reason, it was argued at the time of the trial of the cause here, as respects the motion for nonsuit, that the testimony did not support the cause of action preferred. This was simply controverted without insist-

ing upon any such objections as that the grounds of the motion were not specifically stated, and the case was decided upon the issue thus presented. Having met the issue in the form indicated without success, it is now too late by motion for rehearing to insist upon the technical objection suggested.

The other contentions as to the proper construction of the contract have been treated of in the main opinion.

REHEARING DENIED.

Decided 21 December, 1903.

STATE v. MILLER.

[74 Pac. 658.]

43 325
446 462

CRIMINAL LAW — PHOTOGRAPHS AS EVIDENCE.*

1. Although photographs of persons, places, or things are sometimes admitted as evidence, they are never competent unless necessary in some matter of substance, or instructive in establishing material facts or conditions, which was not the case here where all the facts sought to be shown by the photographs could have been established by oral testimony.

IDEM.

2. To be admissible as evidence even under appropriate circumstances photographs must be correct representations of the subjects or conditions intended to be thereby presented.

CROSS-EXAMINATION OF AN ACCUSED.

3. Under B. & C. Comp. § 1400, authorizing the cross-examination of one accused of crime on all facts to which he testified in chief, tending to his conviction or acquittal, where one accused of murder related the circumstances leading up to the difficulty, and to his presence on the premises of the deceased, cross-examination was permissible to show that accused had been ordered off the premises by the deceased about two months previous to the killing, and that they were not on good terms, since these matters tended to show the feelings of the parties toward each other.

CROSS-EXAMINATION — BROWBEATING A WITNESS.

4. Cross-examination that does not elicit material information and tends to humiliate or bully a witness should not be permitted.

INSTRUCTION SHOULD BE BASED ON THE EVIDENCE.

5. Instructions stating correct propositions of law but not appropriate to the evidence in the case should not be given, as they tend to confuse the minds of the jury.

RIGHT OF SELF-DEFENSE — RELIANCE ON APPEARANCES.

6. Though in fact there is no actual necessity for taking life, yet the right of self-defense may be exercised if the person assailed has reasonable ground to be-

* NOTE.—See monographic note, Photographs as Evidence, with the cases of *Baustian v. Young*, 75 Am. St. Rep. 468-479, and *Dederichs v. Salt Lake C. R. Co.* 35 L. R. A. 802-815.—REPORTER.

lieve, and in good faith actually does believe, from the surrounding conditions, that death or the infliction of great bodily harm is imminent.

CONFLICTING INSTRUCTIONS AS ERROR.

7. The giving of directly contradictory instructions on a vital question in a case constitutes reversible error, for a charge of that kind cannot be construed into a harmonious and correct statement of the law involved. For example, a charge that unless the necessity for taking life is actual, present, and urgent, a defendant cannot invoke the doctrine of self-defense, is entirely inconsistent with an instruction that defendant has a right to act on appearances if he acts in good faith, and the jury cannot get from such a charge a correct idea of the rights of the defendant.

From Harney: MORTON D. CLIFFORD, Judge.

The defendants George S. Miller and James Colwell were jointly indicted with Bert Bailey for the murder of Joseph Warren Curtis, and convicted of murder in the second degree; Bailey having been discharged from the indictment during the progress of the trial. Briefly, there was evidence tending to show that shortly prior to the homicide Curtis had driven off the range a number of horses (among them a mare and colt claimed by defendant Miller), and at the time had the colt in a corral upon his premises; that, on being advised of the fact by his codefendant Colwell, Miller went to the Narrows, fifteen to eighteen miles distant from his home, and near the residence of Curtis, where he was informed that the latter forbade him from coming upon his place; that he then took counsel over the telephone with an attorney at Burns, for the purpose of ascertaining his legal rights in the premises, and was advised that he could replevy the colt or take it wherever he found it, provided he was able to do so without committing a breach of the peace; that he, Bailey, and Colwell left the residence of the latter about 8 o'clock on the evening of March 22, 1902, gathering up several gentle horses on the way and taking them along, intending to turn the colt out of the corral and drive it away with them; that, to reach the corral, they cut an outer wire inclosure of Curtis', a third of a mile or more distant, Miller going ahead; that, when they had gone about half the distance to the corral,

Curtis ordered Colwell and Bailey to take the horses off of his premises, and that they drove them back; that Miller was not aware of what had been done, nor of the presence of Curtis, until he came near the corral; that Curtis was armed with a 22-caliber rifle, and the defendant with a shotgun; and that several shots were fired, resulting in the death of Curtis. The killing is admitted, but defendants seek to justify it as an act of self-defense.

REVERSED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For the state there was a brief over the names of *Andrew M. Crawford*, Attorney-General, *William Miller*, District Attorney, and *Thornton Williams*, with an oral argument by *Mr. Crawford*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

1. At the trial, three photographs of the deceased, showing the gunshot wounds, were offered and admitted in evidence over the objection of defendants. This constitutes one of the assignments of error. One of the photographs shows shot wounds on the upper part of the left breast, about the shoulder clavicle, and neck; and the other two portray numerous wounds of the same nature upon the back and left side. The purpose of introducing them was to show thereby the number of shots discharged upon the person, and that two of them took effect from the side or rear, in order to discredit Miller's statement that he fired all the shots while Curtis was shooting at him. McMullen, who took the photographs, testified that they were as correct as any that could be taken under the circumstances, and considering the condition of the light in the room. Dr. Marsden, after minutely and particularly

describing the wounds found upon the body, further testified that the photographs represented their true character as nearly as could be done by the process, but that they were not exact reproductions, in that they failed to indicate the oblique appearance of some of the wounds on the upper part of the chest. Photographs, when admitted in evidence, should be shown to be correct representations of the conditions existing, or of the subject sought to be verified by the artificial view presented. Whether, however, the preliminary proofs in this regard are sufficient upon which to allow them to go to the jury, is a matter largely within the sound discretion of the trial court: *Blair v. Pelham*, 118 Mass. 420; *Verran v. Baird*, 150 Mass. 141 (22 N. E. 630); *Harris v. Quincy*, 171 Mass. 472 (50 N. E. 1042); *Church v. Milwaukee*, 31 Wis. 512.

2. There is a limit, however, to the use of photographs as evidence, and, while they are competent for some purposes, they are not competent or appropriate for all. Generally, they may be used to identify persons, places, and things; to exhibit particular locations or objects where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where they will conduce to a better or clearer understanding of such testimony. They may also be employed to detect forgeries, and to prove documents where the originals cannot be readily produced. But unless they are necessary in some matter of substance, or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to improper or irrelevant considerations: *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307 (80 N. W. 644); *Selleck v. City of Jonesville*, 104 Wis. 570 (80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892); *Fore v. State*, 75 Miss. 727 (23 South. 710). The photo-

graphs here introduced were wholly unnecessary as proof of the number of shots fired, or the direction from which they were discharged, as it respects the person of the deceased. Nor did they serve to elucidate or to explain the testimony of the witnesses in the case. The shot wounds were distinctly visible upon the body, where also could be seen the direction from which they took effect, and all conditions attending them were susceptible of being established in the ordinary way by the testimony of the witnesses who had occasion to observe and examine them, so that photographic representations of the appearance of the body were neither necessary nor instructive for indicating the existing conditions. Beyond this, the pictures were not faithful reproductions, as one witness testified that they did not show the oblique character of some of the wounds, and they presented a gruesome spectacle of a disfigured and mangled corpse, very well calculated to arouse indignation with the jury, and were manifestly harmful instrumentalities for use as evidence against the defendants, without being useful, in a legitimate sense, for the state. There was error, therefore, in permitting them to go to the jury.

3. Colwell, as a witness for the defense, related in detail the circumstances leading up to the difficulty resulting in the homicide from the time the colt was last seen upon the range, which tended to show, among other things, that he first discovered the animal in Curtis' possession upon his premises, and communicated the fact to Miller; that the latter came to his place, and, with Bailey, they went to the premises of deceased for the purpose of regaining possession of the colt, thus continuing the narrative attending their mission, indicating the motives that induced such action on their part. Upon cross-examination he was asked by the district attorney if he said anything to the deceased about the colt, and answered in the negative. It was then

developed, over objection, that he and the deceased had had some difficulty; that at one time, a couple of months or so prior to the homicide, he ordered deceased off of his premises; that they were not on very good terms; and that he knew the deceased had warned Miller not to come upon his place unless he came with an officer. The objection urged was that the cross-examination which developed these matters was not proper, the witness being a defendant in the cause. The state had a right to examine the witness upon all facts to which he had testified in chief, tending to his conviction or acquittal: B. & C. Comp. § 1400. There has been much discussion as to whether the witness, under this statute, does not occupy the same position as any other witness, and whether the cross-examination may not be equally as broad and searching. It may now, however, be considered as settled in this state that he does not, and that his cross-examination should be confined to the facts or matters concerning which he has testified in the first instance. The statute, however, is not to receive an unduly restricted or narrow construction, and the cross-examination must extend the inquiry to facts and matters manifestly germane and relevant to the facts testified to in chief, tending to their explanation and elucidation, and in this respect may be as searching and broad as the foundation upon which it rests: *State v. Abrams*, 11 Or. 169 (8 Pac. 327); *State v. Saunders*, 14 Or. 300 (12 Pac. 441); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167); *People v. O'Brien*, 66 Cal. 602 (6 Pac. 695); *People v. Rozelle*, 78 Cal. 84 (20 Pac. 36). The inquiry here by the state did not exceed the bounds. The purpose, no doubt, was to test the motive that actuated the parties in going to the premises of the deceased. If there was an ill feeling between the witness and the deceased, this would serve to throw some light upon the question; and it was there-

fore germane and relevant to the inquiry in chief, and consequently competent.

4. The cross-examination of the defendant Miller of which complaint is made was of a similar nature, and we are not prepared to say that the court erred in permitting it. Some questions were propounded, however, which it seems to us were caustic, and might as well have been omitted. It was drawn out of the witness that he took a shotgun and some shells with him, and that he did not get the colt. Then followed these interrogatories: "You did get a man?" "You did get a human life, didn't you?" "You got a human life, didn't you?" Again, after the witness had stated that about the time he fired the last two shots he heard Mrs. Curtis, wife of the deceased, scream, these questions were propounded, and he was required to answer them, namely: "Did she scream like a woman?" "Like a woman whose husband was being murdered?" Inquiries of the kind are calculated to badger and browbeat the witness, without serving to elicit any fact valuable to the controversy; and, while we are unable to say that there was an abuse of discretion, we cannot approve such a method in practice.

5. The court, at the request of the state, gave the following charge to the jury, to wit:

"It is not always that the danger should be real, in order that a person may justify on the ground of self-defense, but if the defendant, acting as a reasonable man, had reason to believe and did believe that his life was in danger, or in danger of great bodily harm, at the hands of deceased, and, acting upon such belief, took the life of the deceased, such an act on his part will be justifiable, although it might afterward appear that there was in fact no real danger."

After an intervening instruction, the court continued:

"I charge you that it is a well-settled principle of law that in an altercation, where one is assaulted, and then retreats to a place of safety, he has no right to arm himself

with a deadly weapon and renew the combat, when he has a reasonable opportunity to escape; and if he does so he becomes the aggressor, and if, in the conflict that ensues, death results, he cannot claim to have acted in self-defense.

"I charge you further that the right of self-defense does not imply the right of attack, and will not avail in any case when the difficulty was induced by the party himself.

"The law regards human life as the most sacred of all interests committed to its protection, and there can be no successful setting up of self-defense unless the necessity for taking life is actual, present, and urgent—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from great bodily harm."

The defendants complain of these three latter instructions as prejudicial. The first of them was not called for under the testimony of the case, as disclosed by the bill of exceptions. There was no evidence tending to show that the defendant retreated to a place of safety after having been assailed by the deceased, or that he thereafter armed himself and renewed the conflict, and it was therefore improperly given. The second contains, perhaps, a sound principle of law, in the abstract, but it was inapplicable in the relation in which it was announced.

6. The gravest error, however, was committed in giving the third of these latter instructions. The jury were told thereby that unless the necessity for taking the life of the deceased was actual, present, and urgent, there could be no successful setting up of self-defense. This wholly eliminates the well-established qualification or element of the rule that a person assailed may act upon appearances, and that if he has reasonable ground to believe, and in good faith does believe, from the conditions present, that death or the infliction of great bodily harm is imminent, although the danger may subsequently prove not to have been real or actual, his act in taking the life of the aggressor will also be justifiable. A citation of authorities to this statement

of the law is scarcely necessary, but see *Goodall v. State*, 1 Or. 334, 338 (80 Am. Dec. 396); *State v. Morey*, 25 Or. 241 (35 Pac. 655); *State v. Porter*, 32 Or. 135 (49 Pac. 964); *State v. Gibson*, 43 Or. 184 (73 Pac. 333).

7. Nor does the instruction first herein noted, announcing the correct rule as to the right of the accused to act upon appearances, cure the error. The instructions are not only wholly disconnected in context, but are in direct conflict, so that they cannot be read together as a harmonious and correct statement of the principle of law involved: *People v. Gonzales*, 71 Cal. 569 (12 Pac. 783); *Perkins v. State*, 78 Wis. 551 (47 N. W. 827); *State v. Keasling*, 74 Iowa, 528 (38 N. W. 397). For these errors the judgment of the trial court must be reversed, and a new trial ordered.

Instructions Nos. 1, 3, 4, and 5 asked by the defendants and refused, of which complaint is made, were none of them proper, in the form submitted. Other errors are also assigned, but, as the questions involved will probably not arise upon a retrial, we deem it unnecessary to consider them now.

REVERSED.

Decided 13 July, rehearing denied 5 October, 1903.

PATTERSON v. UNITED ARTISANS.

[72 Pac. 1005.]

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44	553

PROOFS OF DEATH FURNISHED BY MUTUAL BENEFIT SOCIETY AS EVIDENCE.

Adverse statements made by the officers or agents of a mutual benefit society in accordance with its rules are competent evidence as admissions against interest: for instance, where the by-laws of a mutual benefit society provided that on the death of a member the officers of the local society to which he belonged should furnish full proof of death on printed blanks prepared for that purpose, which also required the local officers to give their opinion as to the validity of the beneficiary's claim against the society, the local officers must be considered the agents of the general society, and their statements and admissions thus made against the interest of the general organization are competent evidence in an action on the benefit certificate.

From Multnomah: MELVIN C. GEORGE, Judge.

Action by Leo J. Patterson, through J. P. Finley, his

guardian, against the United Artisans, resulting in a judgment for plaintiff, wherefore this appeal. **AFFIRMED.**

For appellant there was a brief over the names of *Guy G. Willis* and *Seneca Smith*, with an oral argument by *Mr. Smith*.

For respondent there was a brief over the names of *Arthur C. Spencer* and *Chamberlain & Thomas*, with an oral argument by *Mr. Spencer* and *Mr. Geo. E. Chamberlain*.

MR. JUSTICE BEAN delivered the opinion.

The plaintiff, by his guardian, brought an action in the court below against the United Artisans, upon a certificate issued to his father, a member of one of its subordinate assemblies, by which it agreed to pay plaintiff the sum of \$1,900 in case of the death of his father. The sole defense is that the insured committed suicide, which released the society from liability. The jury found against the defendant upon this question, and from the judgment entered it appeals.

The only assignment of error is the ruling of the court in admitting in evidence a certificate or statement of the officers of the subordinate assembly to which deceased belonged, which accompanied and was a part of the proof of death submitted to the supreme assembly. The death of the insured is admitted by the pleadings, and it is also admitted that due proof thereof was made as required by the rules of the society. The position of the defendant is that the evidence referred to is incompetent, because there was no issue to which it was applicable, and for the further reason that the statement of opinions therein contained is not binding upon it. Section 41 of the by-laws of the defendant provides :

"Proof of Death. Upon the receipt of the notice of death of a beneficiary member, the supreme secretary shall for-

ward to the secretary of the assembly of which the deceased was a member duplicate blank forms for proof of death, together with blank claimant's affidavits, which must be filled out and sworn to by the beneficiary or beneficiaries, or, if the beneficiary be a minor child, by a guardian duly appointed by the proper legal officer, and witnessed and certified by the master artisan, under seal of the assembly of which the decedent was a member. The proof must show that the deceased was a member in good standing at the time of his death; name in full, date of joining the society, date and cause of death, and the name of the person or persons and their relationship to deceased to whom the benefits are to be paid; a part of which proofs shall be affidavits of the master artisan and secretary as to the record of the member, also the affidavit of the attending physician or physicians, if any, stating the disease of which the member died, duration of illness and date of death; also the affidavit of the undertaker in charge or the clergyman officiating at the funeral, if any, together with such other sworn testimony as may be required by the board of directors to fully establish the death and identity of such deceased member. Upon the receipt of such proof, the same shall be laid before the board of directors, who shall approve or disapprove the same, and if approved by them an order for the payment of the amount to which the beneficiary is entitled shall be drawn upon the supreme treasurer, which order shall be signed by the supreme secretary and countersigned by the supreme master artisan, and be made payable to the order of the beneficiary designated in the certificate issued to decedent or the duly qualified guardian of said beneficiary; provided that sixty days from the date of the receipt of such proofs by the supreme secretary shall be allowed for the approval or disapproval of such claim by the board of directors, and that sixty days shall be allowed after the approval of the claim in which to make payments."

The forms of proof promulgated by the supreme assembly, and which its secretary, in compliance with the by-law quoted, forwarded to the officers of the subordinate assembly of which the deceased had been a member, com-

prised a certificate or statement to be filled out and verified by the directors of the local assembly, in which they were required to certify to certain facts concerning the deceased and the rights of the claimant. In the certificate to which objection was made in this case the officers of the local assembly certified as to the date and cause of the death of the insured ; the time when he joined the order ; the date to which his last assessment was paid, the date of his beneficiary certificate ; his occupation ; that he was a member in good standing ; that they had seen the benefit certificate and believed that plaintiff was legally entitled to recovery thereon ; that they had carefully examined the records of their assembly, and that no material fact had been concealed ; that they had examined the proofs of death attached to their certificate, knew the contents thereof, and verily believed the statements and allegations therein contained and set forth were true ; that they knew of no reason why the plaintiff's claim should not be paid, and recommended its allowance by the board of directors of the supreme assembly. The by-laws of the defendant society, and the form for proof of death provided by it, imposed upon the officers of the assembly of which the deceased was a member the duty of preparing, certifying to, and forwarding to the head office proof of death, and their opinion as to the validity of the claim, using blank forms furnished for that purpose by the supreme secretary. They were thereby made the agents of the society for the purposes stated, and their acts and declarations in the discharge of the duty thus imposed were the acts and declarations of the defendant, and not the insured : *Cox v. Royal Tribe*, 42 Or. 365 (71 Pac. 73, 76, 60 L. R. A. 620); *Anderson v. Supreme Council of Chosen Friends*, 135 N. Y. 107 (31 N. E. 1092); *Supreme Council of Benev. Legion v. Boyle*, 10 Ind. App. 301 (37 N. E. 1105). Any statements or admissions made by such officers in the discharge of their

duties and as part of such proof, if adverse to the defendant, may, we think, be properly treated as admissions against its interest, and competent evidence as such for whatever they may be worth: 2 Bacon, Benefit Soc. § 471; Mechem, Agency, § 714; *Insurance Co. v. Newton*, 89 U. S. (22 Wall.) 32; *North Pac. Lum. Co. v. Willamette Mill Co.* 29 Or. 219 (44 Pac. 286); *Wicktorwitz v. Farmer's Ins. Co.* 31 Or. 569 (51 Pac. 75). There was therefore no error in the admission of the testimony.

There was error, however, in the amount of the judgment. The plaintiff claimed only \$56.85, in his cost bill, but the amount thereof was erroneously entered in the judgment at \$71.10. The attention of the court below was not called to this error, and it was not discovered by the plaintiff until after the appeal was taken. He thereupon offered in his brief to make the necessary reduction, and, upon his filing a remittitur of the excess, the judgment will be affirmed, with costs.

AFFIRMED.

Decided 18 July, rehearing denied 5 October, 1903.

WILLIAMSON v. NORTH PACIFIC LUMBER CO.

[73 Pac. 7.]

INSTRUCTIONS ON IRRELEVANT ISSUES.

1. Instructions to juries should not deal with issues outside the pleadings and the evidence, and when such instructions are requested they may be refused.

SALES—INSTRUCTION AS TO GOOD FAITH OF AGENT.

2. Defendant sold lumber to plaintiff to be shipped to plaintiff's customers in another country; the contract providing that, if a dispute arose at the port of discharge as to the quality of the lumber, defendant should appoint an agent on the spot to settle it. A dispute arose, and defendant appointed plaintiff its agent to settle. Plaintiff selected certain surveyors to examine the lumber and report what allowance should be made to the buyers. These surveyors recommended a certain reduction, and plaintiff settled with the buyers on this basis. Under these facts an instruction that if plaintiff's foreign house used reasonable care in selecting surveyors to examine the lumber, and in reliance on their report settled the dispute in good faith, the defendant is bound by such settlement, was properly refused as being inappropriate, for the surveyors were merely a means used by the plaintiffs and were in no sense agents of defendant.

INSTRUCTION AS TO CREDIBILITY OF EVIDENCE BY DEPOSITION.

3. Under a statute allowing evidence by oral examination or deposition, the refusal of a requested charge that the fact that a witness testifies by deposition

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does not affect his credibility is not error, where there are no peculiar circumstances attending the introduction of depositions which call for such a charge.

INCONSISTENT RULINGS.

4. The exclusion as irrelevant of evidence as to a matter not in controversy, and the refusal of a request to charge that this matter was not in controversy, are not erroneous, as inconsistent.

From Multnomah: JOHN B. CLELAND, Judge.

Action by Stephen Williamson and others doing business under the firm name of Balfour, Guthrie & Co. against the North Pacific Lumber Company. From a judgment for defendant plaintiffs appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Francis D. Chamberlain*.

For respondent there was a brief and an oral argument by *Mr. Thomas N. Strong*.

MR. JUSTICE WOLVERTON delivered the opinion.

This case having been here twice before, the statement of facts on the second appeal will suffice to indicate the issues now involved, except it is deemed essential that further notice should be taken of the nature of the separate defenses interposed to the causes of action set up in the complaint. Concisely stated, they are that defendant appointed the plaintiffs its representative and agent, upon the terms stated, to settle and adjust certain alleged disputes with the purchasers of the lumber in question, which appointment and trust was duly accepted; that plaintiffs, in violation of their said trust and agency, conspired and confederated with Williamson, Balfour & Co., of Valparaiso, Chile, to defraud defendant, and pretended to dispose of the excess of the Airlie cargo at forced sale as inferior lumber, and to submit the alleged dispute as to the upper assortment of lumber of the Ballochmyle to arbitration and award, and caused the pretended arbitrators to decide and report that the buyers should be allowed a discount of thirty per cent from the agreed price, and that

in pursuance of said pretended and unauthorized arbitration and award they pretended to sell said upper assortment of the Ballochmyle, also at forced sale, as inferior lumber; that said pretended sales were secretly made, and without the knowledge of the defendant; that the alleged dispute, both as to the quality of the excess of the Airlie and the upper assortment of the Ballochmyle, was simulated only and fictitious, when none such really existed; and that said pretended settlement, arbitration, and sale were and are fraudulent, unreasonable, and extortionate, and as to the defendant are of no binding validity or effect. This brings us to the numerous assignments of error, and we will consider them much in the order presented.

1. The court refused to instruct that "there is no evidence in the case that either plaintiffs or their Valparaiso house submitted the matters in dispute, or either of them, to arbitration, and there is no such question in the case." This instruction was manifestly requested on the part of plaintiffs, in view of the separate defense interposed to its second cause of action. To be understood, it should be premised that at the first trial of the cause, in both the circuit and in this court, plaintiffs proceeded upon the theory that the agreement between the parties with reference to the settlement of the dispute and the subsequent action had in pursuance thereof was in effect a submission to arbitration and award, and should be so treated: *Williamson v. North Pac. Lum. Co.* 38 Or. 560 (63 Pac. 16, 64 Pac. 854). The further defense was therefore intended, among other things, to meet this theory and contention of plaintiffs, and to put defendant in a position to show, not only that the alleged dispute was simulated and fictitious, but that no arbitration was ever had or award made, or, if there was, it was without the authority of defendant, and not binding upon it. By the decision on the second appeal it was definitely determined that the appointment

of the plaintiffs as agents to settle the alleged dispute did not constitute them, or the allied house at Valparaiso, Chile, arbitrators, whose award or adjustment was binding upon defendant until appropriately impeached or set aside: *Williamson v. North Pac. Lum. Co.* 42 Or. 153 (70 Pac. 387). Now, as we understand from the record, the theory that the alleged settlement by the plaintiffs through their allied house at the port of discharge was tantamount to an arbitration and award was no longer insisted upon; but it was contended that the settlement by the agent was, in the absence of fraud, itself conclusive and binding upon defendant. Thus the arbitration theory dropped entirely out of the case, and with it all necessity or attempt on the part of defendant to combat it. Indeed, defendant had never relied upon arbitration as a defense, and never attempted to establish such a feature in the case. When called upon, defendant offered to show that no such arbitration or award was ever had or made with its consent or authority; but, when the plaintiffs ceased to insist upon the theory that the alleged settlement was in effect an award of arbitrators, all contention upon that point was at an end, and defendant could not and did not offer in evidence anything to combat it, and thus was the issue entirely eliminated from the case. No one insisted upon it, one way or the other, and the instruction asked could serve no good or practical purpose, and was therefore very properly refused.

The court refused to instruct, as requested, that defendant's allegations of fraud with reference to the settlement of the dispute touching the upper assortment of the Ballochmyle were not supported by the evidence. This constitutes the second assignment of error. The evidence in regard to the subject was as full upon this trial as at the preceding one, and plaintiffs are therefore concluded by

the decision on the second appeal: *Williamson v. North Pac. Lum. Co.* 42 Or. 153 (70 Pac. 387).

The third assignment relates to the refusal of the court to give an instruction amply covered by the general charge, and the sixth assignment is of the same nature.

2. The fourth and fifth assignments may be examined together. They are founded upon the court's refusal to instruct that if plaintiff's Valparaiso house used reasonable care in selecting surveyors to examine the upper assortment of the Ballochmyle, and after examination the surveyors recommended that an allowance of thirty per cent be made to the buyers, and that if, relying upon such report, the Valparaiso house made the allowance in good faith, believing it to be to the best interest of the defendant, then that defendant is bound by the settlement. In other words, it is insisted that if the Valparaiso house used reasonable care and circumspection in the selection of subagents at Antofagasta to examine the cargo, and subsequently in good faith acted upon their advice and report, then defendant would be bound by the settlement thus effected, even though the subagents were guilty of fraud, and that neither the plaintiffs nor the Valparaiso house are responsible for the acts of the subagents. It is in evidence that, in settling with the buyers of the upper assortment of the Ballochmyle, the Valparaiso house, through their agent at Antofagasta, a port six hundred miles distant, appointed two British merchants, acquainted with the business, to survey the lumber and report to them what allowance, if any, should be made to the buyers; that these surveyors called to their assistance an expert, and after an extended examination reported to the Valparaiso house that the lumber was much inferior to the grade contracted for, and that an allowance of thirty per cent from the contract price should be made to them; that thereupon the Valparaiso house negotiated with the buyers, and they took

the lumber at the reduction suggested; and that all the parties concerned were reputable, competent, and honest.

As applied to these facts, we do not believe that the instructions asked were warranted. It appears that the Valparaiso house, through their agent at Antofagasta, employed the surveyors as instrumentalities, with the view of obtaining information relative to the condition and value of the lumber, deemed necessary, presumably, for their guidance in negotiating a settlement with the buyers. The surveyors were acquainted with the lumber business, and their report to the Valparaiso house was made after an investigation in which they were assisted by an expert on lumber. After thus possessing themselves of such information, the Valparaiso house negotiated a settlement with the buyers on the basis of the report. The surveyors were not given authority to confer with the buyers, or to make or enter into any settlement whatever with them. Their only function was to gather information and report it to the Valparaiso house. This they did, and the house thereafter conducted and negotiated the settlement through their agent at Antofagasta. The case does not differ in principle from one where the agent has conducted the examination in person. The surveyors were the agents of the Valparaiso house, if that is a fit term to apply to them, and not of defendant, and it was through them that plaintiffs sought the desired information that was to control their action in negotiating the settlement with the buyers. Suppose the Valparaiso house had gone in person to Antofagasta, and had made personal inquiry of those very men who acted as surveyors as to the value and quality of this cargo, and they had answered, "We will make further inquiry, and then give you an estimate," and that, after having conferred with an expert on lumber and made an examination, they reported the result, and the Valparaiso house had acted upon it; could it be said that the sur-

veyors were constituted the subagents of defendant? They were only employed as the means or source of information for the Valparaiso house, and, whether or not they were in a sense an agency through which the information was acquired, they were in no sense constituted the agents of the defendant whose acts were conclusive and binding upon it. Nor were they employed for any such purpose as to settle the dispute in the stead of the defendant, as were the plaintiffs or their Valparaiso house. So that these instructions requested were inapt, under the facts in evidence.

The seventh assignment is that the court erred in not instructing that plaintiffs were entitled to recover the expenses incurred in settling the dispute, unless the Valparaiso house intended to defraud the defendant; but, the verdict being in its favor, the jury evidently must have found that plaintiffs or their Valparaiso house were guilty of fraud in conducting and making such settlement, and, the action having been based thereon, the defendant could not be made liable for the expenses of a fraudulent settlement.

The eighth assignment relates to the order overruling plaintiffs' demurrer to the separate defense to their second cause of action. It is based upon the erroneous theory that defendant pleaded a submission of the controversy to arbitration and award. The purpose of such defense was to avoid what the plaintiffs were insisting upon as an arbitration and award. In this view the demurrer was properly overruled.

In the ninth assignment three objections are urged to an instruction given. The first is that it conveyed the impression to the jury that, if the settlement was vitiated by fraud, plaintiffs should not recover anything. But the language employed is not susceptible of such a construction. The jury were told that, if they found that the set-

tlement was fraudulent, then the plaintiffs could not recover thereon; that is, upon the settlement. The instruction was in line with plaintiffs' theory of the action — that they were entitled to recover upon the settlement made. The second objection involves a criticism of the use of the word "constructively," as qualifying the term "fraudulent," in their claim that the answer charges actual fraud, and that the defendant should have made out a case of intentional fraud. The criticism is technical and unavailing, especially after verdict. The answer is broad enough in its scope to admit of the proof offered, and the instruction complained of is well adapted to such proof. The third objection is that there was no evidence that anything was deliberately concealed from the defendant upon which to warrant the instruction that if, in connection with other conditions enumerated, the jury found that the Chilean house deliberately concealed from defendant information necessary to its protection, then that plaintiffs could not recover. The whole course of the dealings between the parties with reference to the sale and settlement on account of this lumber was before the jury. There was some evidence of irregularities attending it, both of omission and commission, and it was not improper to inform them that, if any such information had been deliberately concealed from the defendant, this would constitute a badge of fraud; and such is the effect of the instruction.

The tenth assignment goes to the instruction given, that "if you fail to find from the evidence under these instructions that plaintiffs have been damaged by reason of the excess shipment of 39,608 feet, you should find for the defendant on the first cause of action, the excess shipment on the Airlie." This is, however, but a logical deduction from the previous instruction relative to the subject, to which no exceptions were saved, and was relevant to the issues.

3. The eleventh assignment relates to the refusal of the court to instruct that the fact that a witness testifies by deposition does not affect his credibility. The statute provides the manner of producing evidence, which may be by oral examination, or by deposition under certain conditions. No distinction is made as to the weight to be given to evidence, whether produced by the one method or the other, and, unless there are some peculiar conditions or circumstances attending the production of evidence by deposition, such as to warrant the court in directing special attention to the matter, so that the jury may give it due weight and credibility, the court may without impropriety refuse to instruct upon the subject.

4. The twelfth assignment involves a ruling of the court in refusing to allow a witness for plaintiffs to testify to the quality of the flooring that went into the upper assortment of the Ballochmyle, compared with the flooring called for by the contract, and in refusing to instruct that the jury should not consider the quality of the lower assortment of the Ballochmyle and the cargo of the Airlie, except the excess, and that such cargoes are not in controversy; it being insisted that these rulings are inconsistent, and, therefore, that there was error either in the one respect or the other. The fact is there was no dispute whatever concerning the flooring that went into the upper assortment of the Ballochmyle, and no controversy with reference to the lower assortment, or to the cargo of the Airlie, except the excess. The evidence offered was, therefore, irrelevant. Neither could the instruction requested serve any purpose pertinent to the issues. So that, both being irrelevant, the rulings were not inconsistent, nor subject to the objections interposed; hence there was no error.

The instruction refused involved by the thirteenth assignment is sufficiently covered by the general charge.

The fourteenth and fifteenth assignments are relative to

instructions refused which were wholly inappropriate.

The sixteenth assignment is fully disposed of by the consideration of the ninth.

The seventeenth and eighteenth involve instructions requested which were unnecessary in view of the general charge.

The nineteenth, twentieth, twenty-first and twenty-second relate to the sufficiency of the separate defenses to charge fraud and the evidence to support such a charge; but from what we have already said it must now be apparent that they cannot be entertained. These considerations affirm the judgment of the trial court, and it is so ordered.

AFFIRMED.

Argued 23 June, decided 13 July, 1903.

SEARS v. DALY.

[73 Pac. 5.]

RIGHT OF EXECUTOR TO SUE INDIVIDUALLY.

1. Where a cause of action accrues to an executor or administrator after the death of the decedent, he may sue thereon either in his representative or his individual character, and, if the complaint states a cause of action in one or the other it is sufficient.

NOTES—PRESUMPTION AS TO EXECUTION—BURDEN OF PROOF.

2. The execution of a promissory note in action being denied, there is no presumption of its regular execution, and the burden of proof on that point is with the plaintiff throughout.

WRONG INSTRUCTION NOT CURED BY A CORRECT ONE.

3. In an action on a note, where defendant alleged that the signature of her name thereto was a forgery, an erroneous instruction that the presumption was that the note was regularly executed was not cured by a previous instruction to the effect that the burden of proof was on plaintiff to show that defendant executed the note, as it was impossible to tell which instruction the jury followed.

NOTE—FORGERY—PRESUMPTION—ABSTRACT PROPOSITION.

4. In an action on a promissory note, the execution of which is denied, defendant pleading that the signature is a forgery, an instruction that it will be presumed that the person who signed the note, if not defendant, was innocent of forgery, is of doubtful propriety: *First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, and *Savage v. Savage*, 36 Or. 208, distinguished.

BURDEN OF PROOF IN CASES OF AGENCY.

5. Where defendant denies the execution of an instrument sued on, the question is whether the act of the party signing such instrument, if not defendant, was binding on her, either because she authorized or subsequently ratified it, and the burden of proof is on plaintiff to establish the agency or ratification.

From Marion : GEORGE H. BURNETT, Judge.

This is an action by Van B. Sears, as executor, against John J. Daly, Phya Daly, his wife, and H. B. Plummer, to recover on a promissory note alleged to have been made and delivered by them to the plaintiff, who is described in the caption of the complaint "as executor of the estate of Isaac Ball, deceased," and in the body thereof it is alleged that he "was and now is the duly appointed, qualified, and acting administrator," etc., of such estate. The cause of action stated in the complaint, however, is as follows :

"That on the 9th day of September, 1896, said defendants made, executed, and delivered to plaintiff their promissory note in the sum of \$300, with interest thereon after date, till paid, at the rate of 10 per cent per annum, payable on or before ninety days after date, providing therein that the principal and interest shall be paid in United States gold coin of the present standard value. Said note by its terms further provided that in case suit is instituted to collect said note or any portion thereof defendants agreed therein to pay such additional sum as the court may adjudge reasonable as attorney's fees for instituting and prosecuting such suit. A copy of said note is hereto attached * * and made a part hereof."

This allegation is followed by the averment that no payment has been made on the note except \$200, paid November 11, 1898, and that there is now justly due thereon the sum of \$194.35, for which the plaintiff prays judgment. From a copy of the note attached to and made a part of the complaint it appears that it is payable to "Van B. Sears, executor estate of Isaac Ball." The defendant Phya Daly alone appeared and answered. She denied the execution by her of the promissory note, and, for a further and separate defense, alleged "that she never executed or caused to be executed in her behalf said alleged note," and "that the pretended signature of this defendant to said alleged note is a forgery." The reply put in issue the new matter

alleged in the answer, and set up that the note was executed for and in consideration of the sum of \$300 loaned by the plaintiff to the defendants Phya Daly and John J. Daly, for the use and benefit of Mrs. Daly; that after the note had been executed and delivered she ratified and confirmed the execution thereof, and is therefore estopped to deny that it is her note.

At the proper time defendant requested the court to charge the jury that it was incumbent upon the plaintiff to offer some evidence of his representative character, and, as he had not done so, their verdict must be for the defendant. The court refused to give the instruction requested, and gave the following, among other instructions:

"There is some testimony here on the question of whether or not her name was signed to the note by the husband of the defendant Mrs. Daly. The defendant alleges that her name appended to the note is a forgery. It is presumed, however, that this promissory note was given for a sufficient consideration; it is presumed that private transactions are fair and regular. It would be presumed that this note was regularly executed, but these presumptions are disputable presumptions, and may be overcome by other evidence; but they go to you for what you may deem them to be worth in making up your minds as to your verdict." Again: "It is also presumed that a person is innocent of any crime or wrong, and it would be presumed that the person who signed that note, if not Mrs. Daly, was innocent of the crime of forgery, which she alleges was the cause of her signature or name at the foot of the note. This is also a disputable presumption, and may be overcome by other evidence."

The jury returned a verdict in favor of the plaintiff, whereupon defendant moved for judgment notwithstanding the verdict, because no proof had been offered of a cause of action in favor of the plaintiff in his representative capacity as the executor of the Ball estate, and because the facts alleged in the complaint do not state such a cause of

action. This motion was overruled, and judgment entered in favor of the plaintiff, and defendant appeals, assigning as error (1) the refusal to instruct the jury to find for defendant on account of the failure of proof, (2) the giving of the instruction that there is a presumption that the note was given for a sufficient consideration and was regularly executed, and (3) remarks of the trial judge to counsel during the progress of the trial.

REVERSED.

For appellant there was a brief over the names of *William M. Kaiser* and *Woodson T. Slater*, with an oral argument by *Mr. Slater*.

For respondent there was a brief and an oral argument by *Mr. N. L. Butler* and *Mr. Edw. F. Coad*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. The failure of the plaintiff to prove his representative capacity, or that the note in suit was the property of the estate of which he was executor, was immaterial. The note is alleged to have been given to him after the death of his testator. Where a cause of action accrues to an executor or administrator after the death of the decedent, he may sue thereon either in his representative or his individual character, and, if the complaint states a cause of action in one or the other, it is sufficient: *Burrell v. Kern*, 34 Or. 501 (56 Pac. 809). The averment, therefore, as to the plaintiff's representative character may be regarded as surplusage, and the complaint still state a good cause of action in his favor as an individual. It is a matter of no moment to the defendant in what character the action is prosecuted, or how the complaint shall be construed in this respect. She could in any event set up whatever defense she may have to the note, and the judgment would be a bar to the prosecution of another action upon the same liability. There was no error, therefore, in the refusal of the court

to instruct the jury to return a verdict in favor of the defendant on account of the failure of proof, or in overruling her motion for judgment notwithstanding the verdict

2. In an action upon a promissory note, where its execution is denied by the defendant, there is no presumption that it has been regularly executed. In such case the plaintiff must establish the fact that it is the note of the defendant, and on this proposition he has the burden of proof throughout: Byles, Bills (7 ed.), 438; *Simpson v. Davis*, 119 Mass. 269 (20 Am. Rep. 324); *Mills v. United States Bank*, 24 U. S. (11 Wheat.) 431. In case an instrument in form a promissory note is shown or admitted to have been executed, certain presumptions will attach to it in the hands of the holder, such as that it was made for a valuable consideration, regularly indorsed for value before maturity, is truly dated, and the like (*Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501); and, in an action thereon between the immediate parties, the *onus* is upon the defendant to establish any affirmative defense: Bailey, Onus Probandi, 221. But, where the making of the note is the point in issue, no presumption can attach until its execution is shown. A promissory note is a promise in writing to pay to a person therein named a certain sum of money at a specified time. Until the fact of the signing and delivery by the defendant, or by his authority, is established, there is no promissory note, and nothing to which a presumption can attach. The instruction of the court, therefore, that it will be presumed that the note in suit was regularly executed, was erroneous, because it shifted the *onus* of proof from the plaintiff to the defendant. It was in effect ruling that, if no evidence whatever had been offered as to the execution of the note, the plaintiff would have been entitled to a verdict, or, if the evidence was equally balanced, the plaintiff should prevail on account of such presumption. It

thus shifted the burden of proof, and required the defendant to show affirmatively that she did not execute the note nor authorize its execution, when, under the law, the burden was upon the plaintiff.

3. The error was not cured by a previous instruction to the effect that the burden of proof was upon the plaintiff to show that the defendant executed the note in question, as it is impossible to tell which instruction the jury followed.

4. The instruction that it will be presumed that the person who signed the note, if not Mrs. Daly, was innocent of the crime of forgery, was probably correct as a proposition of law, but we doubt its application to this case. Such an instruction would be eminently proper in a criminal action, and may sometimes be given in a civil action when the inquiry involves an examination of facts relating to the conduct of a party thereto which would constitute a crime (*First Nat. Bank v. Commercial Assur. Co.* 33 Or. 43, 52 Pac. 1050; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461), but its propriety may well be doubted where some act of a third person, not a party to the litigation, is under consideration. However that may be, there is no question in this case concerning the crime of forgery. The only allusion to it is in the defendant's answer.

5. The question upon the trial on this branch of the case was whether the act of the party signing the note, if not Mrs. Daly, was binding on her, either because she authorized or subsequently ratified it, and the burden of proof was upon the plaintiff to establish the agency or ratification: *Connell v. McLoughlin*, 28 Or. 230 (48 Pac. 218). As the judgment must be reversed for these reasons, it is unnecessary to consider the other assignment of error. Judgment reversed and a new trial ordered.

REVERSED.

Argued 29 June, decided 13 July, 1908.

HAWLEY v. HAWLEY.

[73 Pac. 3.]

VENDOR AND PURCHASER—SUFFICIENCY OF EVIDENCE.

1. In a suit by the obligee in a bond for the conveyance of real estate to compel specific performance, evidence held insufficient to show either a transfer of the bond by plaintiff or a ratification of an unauthorized assignment of it in her name by her husband.

VENDOR AND PURCHASER—POSSESSION AS NOTICE OF EQUITIES.

2. A purchaser of real property finding a person other than the vendor in possession is bound at his peril to inquire with reasonable care as to the rights of such occupant, and is chargeable with whatever facts would be disclosed by such an inquiry.

From Lane: JAMES W. HAMILTON, Judge.

Suit by M. J. Hawley against W. B. Hawley and others, in which there was a decree for plaintiff, and some of the defendants appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. A. C. Woodcock*.

For respondent there was a brief over the names of *J. C. Johnson* and *F. G. Eby*, with an oral argument by *Mr. Johnson*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit to compel the specific performance of a contract to convey real property. The facts are that on August 1, 1899, the defendant D. G. McFarland, being the owner in fee simple of lot 4 in block 5 of his Second Addition to Cottage Grove, Oregon, executed to the plaintiff, Mrs. M. J. Hawley, a bond for a deed, covenanting to convey said lot to her on or before one year therefrom, upon payment to him in the meantime of the sum of \$100 and interest thereon at 8 per cent per annum; and, having been permitted to take possession of the premises, she built a house and barn thereon, and has ever since been in the possession thereof. Her husband, the defendant W. B. Hawley, on March 26, 1900, purchased from the defendant

Mathew Sehr an interest in a stock of goods for the sum of \$800, and in payment thereof delivered said bond, upon which was indorsed an assignment, purporting to have been subscribed by the plaintiff to the said Sehr, who, on April 28, 1900, assigned the same to Mrs. C. M. Brown. The plaintiff, on May 31, 1900, served a written notice on McFarland to the effect that she was the owner of said bond, tendered to him the sum due thereunder, and demanded the execution of a deed to said lot, but he, refusing to comply therewith, on August 1, 1900, executed a deed of the premises to Mrs. Brown, who commenced an action against Mrs. Hawley to recover possession thereof, whereupon the latter, having filed an answer therein, commenced this suit in the nature of a cross-bill, alleging the facts, in substance, as hereinbefore stated; that Mrs. Brown was not an innocent purchaser of the premises; and deposited in court the sum due McFarland on the bond. The defendants in separate answers denied the material allegations of the complaint, and alleged new matter therein, which having been denied in the replies, a trial was had, resulting in a decree requiring Mrs. Brown, upon the receipt of \$100 and interest, to execute to Mrs. Hawley a good and sufficient deed to said lot, and perpetually enjoining the further prosecution of said action at law, from which the defendants appeal.

1. It is contended by defendants' counsel that, when the bond was first assigned, the plaintiff knew that her name was subscribed thereto, and ratified the transfer, and hence the court erred in rendering the decree complained of. Mrs. Hawley, as a witness in her own behalf, testifies that she did not subscribe her name to the assignment of the bond, nor authorize any person to do so for her, nor did she know that it had been assigned until about the last of May, 1900. Her husband, as her witness, testifies that

he appended her name to the assignment of the bond, thinking that their marital relations authorized him to do so. Sehr, as a witness in his own behalf, testifies that, before selling his interest in the stock of goods to Hawley, he examined the house on the lot in question, which he knew was owned by Mrs. Hawley, and that she told him on that occasion she did not want to trade off her property. In speaking of the sale of his interest in the goods, he further says: "When we made the trade, I told Hawley to bring his wife down and fix the matter up. In place of bringing her, he brought the bond down already signed, and handed it to me." We are satisfied, from an examination of the testimony, that Mrs. Hawley did not subscribe her name to the assignment indorsed on the bond, and assuming, without deciding, that the method adopted, if thereafter ratified, was sufficient to transfer her equitable interest in the lot, the only question to be considered is whether she ratified her husband's act in signing her name thereto.

One William Cummings had been a partner with Sehr, but, upon the latter's retirement by the sale of his interest in the goods, Hawley became a member of the new firm. The old firm of Sehr & Cummings, at the time it was dissolved, was indebted to a Mrs. S. E. McKinney on a promissory note, and on March 26, 1900, Hawley and his wife and Cummings executed a new note to Mrs. McKinney, and the old one was surrendered, thereby discharging Sehr. This note not having been paid at maturity, Mrs. McKinney commenced an action thereon about the last of May, 1900, and attached the goods in the store, upon the seizure of which Mrs. Hawley served a written notice upon McFarland that the bond belonged to her, and she testifies that this was the first intimation she had of the assignment. She further testifies that she had nothing to do with the store, but upon the goods being attached she

found she was liable for the debt, and assisted in the collection of the accounts belonging to the new firm, and applied the money collected in discharging the debt, saying that she did not consider she had an interest in the store until it was attached. Cummings, as defendants' witness, testifies that Mrs. Hawley was never in the store conducting business, though she remained around there occasionally. Hawley, as a witness for the plaintiff, in answer to the question: "Isn't it a fact that your wife has allowed her name in mercantile transactions, on account of your being embarrassed?" replied: "Yes, sir." Mrs. McKinney, as defendants' witness, in speaking of a conversation she had with Mrs. Hawley, prior to the attachment, concerning her interest in the store, testifies as follows: "She told me she didn't want to trade the property for the store; didn't have any peace until she gave up to it; she was sorry she did so." Mrs. Hawley, in speaking of the note executed to Mrs. McKinney, testifies that she did not know what it was given for, except that her husband wanted to use the money in the store, and she signed the note as security for him, and, referring to the testimony of Mrs. McKinney, she further says: "If I remember right, he had been talking trade. I said I was sorry if I had to give up and trade the property off." This is the material testimony by which the defendants seek to show that Mrs. Hawley ratified her husband's assignment of the bond.

Mrs. McKinney's testimony would strongly tend to support the view contended for by the defendants' counsel if it were entitled to the credit claimed for it. Her note was given March 26, 1900, and, in speaking of the year when it was executed, she said it was 1890. Her attention having been particularly called thereto, however, she corrected the statement by saying it was in 1899, but, the plaintiff's counsel having remarked that it was in 1900, she replied:

"Yes, sir; that is right." What Mrs. McKinney's age is cannot be ascertained from an inspection of her testimony, for she neglected to answer that part of the preliminary question in respect thereto. She testifies, however, that when her note was made she was unable to attend to the matter, and her daughter arranged it for her. From this testimony we conclude that her age has somewhat impaired her memory, for if Mrs. Hawley made the declaration imputed to her, to the effect that she yielded to her husband's importunity to effectuate the trade, it is altogether probable she would have evidenced her consent by signing the indorsement made upon the bond. Sehr's statement that she did not desire to exchange her property for the store is a circumstance tending to corroborate her, and, with the other testimony referred to, leads us to conclude that she never ratified her husband's act in subscribing her name to the assignment of the bond.

2. Sehr and Mrs. Brown knew that Mrs. Hawley was in possession of the property in question, and yet neither of them made any inquiry of her concerning her rights therein or in relation to her pretended transfer thereof. This knowledge was sufficient to put them upon inquiry, which, if prosecuted with reasonable diligence, would have disclosed her rights in the premises: *Bohlman v. Coffin*, 4 Or. 313; *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 158); *Cooper v. Thomason*, 30 Or. 161 (45 Pac. 296). Instead of pursuing this course, the legal title was secured by Mrs. Brown in an attempt to defeat Mrs. Hawley's equity; but, as Mrs. Brown is not an innocent purchaser, the legal title must yield to the superior equity, and hence the decree is affirmed.

AFFIRMED.

Argued 30 June, decided 20 July, 1903.

MIDDLETON v. MOORE.

[78 Pac. 16.]

PRECEDENCE BETWEEN TAX LIEN AND PRIOR MORTGAGE.

Under Section 2821 of Hill's Ann. Laws, providing that "a sale of real property conveys to the purchaser all the estate or interest therein of the owner," and section 2823, providing that a tax deed should operate "to convey a legal and equitable title to the purchaser [property?], sold in fee-simple to the grantee named in such deed," a tax deed did not cut off the lien of a mortgage executed before the assessment and levy of the tax, the assessment being against the person, and not specifically against the property, and the manner of collecting the tax being to make it out of the personal property, if such could be found, and, if not, then out of the realty. Under this statute only the interest of the person assessed passed by the deed: *Nickum v. Gaston*, 24 Or. 380, and *McNary v. Wrightman*, 32 Or. 573, distinguished.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Suit to foreclose a mortgage by J. H. Middleton against F. M. Moore and the Victor Land Company. On July 1, 1893, defendant Moore, being the owner in fee of lot 8, block C, Cherrydale Addition to the City of Portland, mortgaged it to one Wiley, trustee, to secure the payment of four promissory notes of \$175 each. On April 19, 1897, Wiley assigned the notes and mortgage to plaintiff. Moore conveyed the lot to the defendant the Victor Land Company, and this suit is for the foreclosure of the mortgage. The land company answered that, on June 6, 1902, being prior to the date of said conveyance, the Sheriff of Multnomah County executed and delivered to it a tax deed to the lot in question, in pursuance of a sheriff's sale of the same to one Allen, for delinquent state, county, school, and Port of Portland taxes for the year 1897, and city taxes for 1898, the said Allen having duly assigned the certificate of sale to defendant; that at the time of the execution of said deed the lot had not been redeemed from the tax sale, and the defendant is in the actual possession, and prayed that the company be decreed to be the owner in fee simple thereof, divested of the alleged lien of the mortgage. A

48	387
148	420
148	422
43	387
45	404
145	407
45	425

demurrer to this answer having been sustained, a decree of foreclosure was entered, and the land company appeals.

AFFIRMED.

For appellant there was an oral argument with a brief by *Mr. Frank Schlegel* to this effect:

I. A tax title cuts off all prior liens under our statute: *Nickum v. Gaston*, 24 Or. 380-88 (33 Pac. 671, 35 Pac. 31); *Hill's Ann. Laws*, § 2823; *Blackwell, Tax Titles*, pp. 616, 617.

II. An estate in fee simple means a title that takes precedence over liens prior in date created by the act of the owner of the property: *Board of Regents v. Linscott*, 30 Kan. 240 (1 Pac. 81-91); *McFadden v. Goff*, 32 Kan. 415 (4 Pac. 841); *Robbins v. Barron*, 32 Mich. 36; *Peckham v. Millikan*, 99 Ind. 352; *Bodertha v. Spencer*, 40 Ind. 353; *Isaacs v. Decker*, 41 Ind. 410.

III. Under a statute providing that the collector's deed shall convey all the right and interest which the owner had therein at the time when the same was taken for his taxes, a tax deed cuts off prior incumbrances: *Parker v. Baxter*, 2 Gray (Mass.), 185; *Doe v. Deavors*, 8 Ga. 478-482; *Langley v. Chapin*, 134 Mass. 82-88; *In re Douglas*, 41 La. Ann. 765, 770 (6 South. 675); *Maumus v. Brynet*, 31 La. Ann. 462.

IV. See, generally, that the tax lien, irrespective of provisions of statute, is superior to prior liens created by act of owner: *Dunlap v. Gallitin County*, 15 Ill. 7-9; *Becker v. Howard*, 66 N. Y. 5-7; *Burroughs, Taxation*, 347-48; 25 Am. & Eng. Ency. Law (1 ed.), p. 717.

V. A tax title under provisions same as in Oregon has nothing to do with previous chain of title. It is a breaking up of all previous titles: *Gwynne v. Nishwanger*, 20 Ohio, 556; *Jones v. Devore*, 8 Ohio St. 430; *Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 22 Wis. 225; *Stafford v. Fizer*,

82 Mo. 393; *Gitchell v. Kreidler*, 84 Mo. 472; *Myers v. Bassett*, 84 Mo. 479; *Allen v. McCabe*, 93 Mo. 139; *Williams v. Hudson*, 93 Mo. 524.

For respondent there was a brief over the names of *John H. Middleton, in pro. per.*, and *Victor K. Strode*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

The issue presented for our consideration is whether, under the law in force in 1897 and 1898, a tax deed cut off the lien of a mortgage executed anterior to the assessment and levy of the tax for the nonpayment of which the mortgaged premises were sold and the deed given. The solution of this question depends entirely upon the statute then in effect, and its proper interpretation. For the purposes of assessment, lands and town lots were required to be valued at their true cash value, taking into consideration the improvements, the quality of the soil, etc., such value being taken to mean the amount such property would sell for at voluntary sale made in the ordinary course of business: Hill's Ann. Laws 1892, § 2752, as amended by Laws 1893, p. 6. The assessment was made by setting down in the assessment roll the names of the taxable persons, the description of each tract or parcel of land, the full cash value of each parcel and of all taxable personal property, and the total value of the whole: Hill's Ann. Laws 1892, § 2770. A transcript of the assessment roll was placed in the hands of the sheriff, accompanied by a warrant commanding him to collect the taxes charged on the list or roll, and to make the same by sale of the goods and chattels of the respective persons named therein, if necessary: Hill's Ann. Laws 1892, § 2794, as amended by Laws 1893, p. 118. If any of the taxes mentioned in the list remained unpaid, either on real or personal property, the sheriff made out a statement and return thereof in

the form designated, to which he annexed his affidavit, to the effect that the sums therein returned were unpaid, and that he was not upon diligent inquiry able to discover any goods or chattels belonging to the persons charged whereon he could levy, whereupon the county clerk made from said delinquent roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots, and to whom such taxes were charged, and delivered the same, with a warrant attached, to the sheriff, commanding him to levy upon the goods and chattels of such delinquents, and, if none be found, then upon the real property as set forth in the tax list, or so much thereof as might be necessary to satisfy the amount of the taxes so charged. The warrant was deemed an execution against property, and had the force and effect thereof against any person, firm, or corporation against whom such taxes were levied or charged on the roll. If no personal property was found whereon to levy the warrant, or if that levied upon was not sufficient to satisfy the same, it was then levied upon any real property of the person, firm, or corporation against whom the tax was charged, or sufficient thereof to satisfy the same: Hill's Ann. Laws 1892, §§ 2809-2811, 2814-2816. A sale of real property conveyed to the purchaser "all the estate or interest therein of the owner, whether known or unknown, together with all the rights and appurtenances thereto belonging": Section 2821, Hill's Ann. Laws. The owner, or his successor in interest, or any person having a lien by judgment, decree, or mortgage on the property, or any part thereof separately sold, was entitled to redeem the same, and, if no redemption was made within two years, a deed was to be executed thereto, which operated "to convey a legal and equitable title to the purchaser [property], sold in fee-simple to the grantee named in such deed": Section 2823, Hill's Ann. Laws. Any person having a lien by mortgage, or otherwise, upon

any land upon which the taxes were unpaid, was authorized to pay the same, and the receipt of the proper officer, showing the payment, constituted an additional lien upon the premises, which was collectible as a part of the original lien: Hill's Ann. Laws, §§ 2821-2823, 2838.

This cursory statement of the effect of the statute then in force indicates quite clearly the policy of the law for the assessment and levy of taxes and the enforcement of the payment thereof. The assessment was against the person, and not specifically against the property listed. The property was of course the basis of the assessment, and land was made to bear its true cash value. The owner, however, was charged with the tax, and the property was not made primarily or exclusively liable for the payment of its own burden. In other words, the scheme adopted was not a proceeding *in rem*, but rather *in personam*, and the manner of collecting was to make the tax out of the personal property of the taxpayer, if any such could be found, and, when that source was exhausted, to levy the warrant, if the taxes were delinquent, upon sufficient of the realty of the individual to satisfy the same. The "personal property is in the primary fund to which resort must be had for the compulsory payment of taxes" (*Hughes v. Linn County*, 37 Or. 111, 117, 60 Pac. 843), and it was only when that was exhausted by the exercise of diligent inquiry that resort could be had to the land. When, finally, the sheriff, in pursuance of a lawful warrant, sold the land, he conveyed to the purchaser, subject to redemption, "all the estate or interest therein of the owner." The pivotal inquiry here, therefore, is, What estate is thus conveyed? "If," says Mr. Blackwell, in his work on Tax Titles (volume 2, 5 ed. § 954), "the land alone is assessed as the summation of all interests, liens, incumbrances, etc., the general rule is that the deed carries a fee simple absolute, a new and independent title, the land itself being conveyed; and all prior

liens, incumbrances, and interest in, to, or upon the land, are extinguished." But, "on the other hand," he continues, "where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer pass only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment."

Mr. Burroughs states the principle thus: "In those states where the land is assessed to the owner, a report is made of his delinquency in paying the tax, and the sale is made by the tax officers in pursuance of such report, and there are no proceedings against the land *in rem*. The purchaser at the tax sale then becomes the owner only of such interest as the person assessed had in the land": Burroughs, Tax'n, § 122. The text of these authorities is supported by numerous adjudications: *City of Nashville v. Cowan*, 10 Lea (Tenn.), 209; *Gates v. Lawson*, 32 Grat. (Va.) 12; *Dows v. Drew*, 27 N. J. Eq. 442; *Blackwell v. West Amwell*, 43 N. J. Eq. 165; *Smith v. Lewis*, 2 W. Va. 39; *McDonald v. Hannah* (C. C.), 51 Fed. 73, 59 Fed. 977 (8 C. C. A. 426). And, while the states of the Union adopting a like policy or scheme for the collection of revenue are greatly in the minority, yet the rule of law governing in the premises has become well established and clearly defined. In *Day v. Micou*, 85 U. S. (18 Wall.) 156, it was

held that the federal statute directing a seizure of all the estate and property of certain designated persons did not extend to or cut off the interest of a mortgagee holding a *bona fide* mortgage upon the premises seized thereunder. So, it was said, in *Dows v. Drew*, 27 N. J. Eq. 442, that "taxes levied subsequent to the registry of a mortgage do not have priority over it, without express legislation giving them priority." This principle is reasserted in *Blackwell v. West Amwell*, 43 N. J. Eq. 165, and applied in *Smith v. Lewis*, 2 W. Va. 39, a case of much analogy to the one at bar. Under these authorities, it is quite apparent that neither the tax, nor the deed given in pursuance thereof, cuts off, eradicates, or extinguishes the lien of a prior mortgage.

But, before disposing of the matter finally, we will notice further the forcible argument of counsel for defendant. He insists that the expression, "all the estate or interest therein of the owner," is to be read in the light of subsequent sections of the statute, whereby the owner or his successor in interest, or any person having a lien, by judgment, decree, or mortgage, on the property, or any part thereof separately sold, was authorized to redeem from the sale, and any person having a lien by way of mortgage or otherwise might pay the tax and add it to his own lien, and providing that the deed "shall operate to convey a legal and equitable title to the purchaser [property] sold in fee-simple to the grantee named in such deed," and that, when so read, it signifies the entire or fee-simple estate in the lands sold, divested of all liens and incumbrances of whatsoever nature. A view in the retrospect will explain the situation. By section 72 of the territorial act of January 27, 1854 (Laws 1854-55, p. 446, c. 1, tit. 6), it was provided that the tax deed "shall vest in the grantee an absolute title in fee simple in such lands"; and, by section 77, that "all taxes assessed on any tract or parcel of

land, and all costs, charges, and interest thereon, shall be a lien on such land until paid": Laws 1854-55, p. 447. In the same act (section 80, tit. 7) is the provision for the payment of taxes by the mortgagee or other lienor, and adding it to his lien. By the act of October 21, 1864, the provision touching the effect of a tax deed was entirely eliminated, and so also was the provision making the tax a lien upon the parcel against which it was assessed. We find in this act, however, the first appearance of the provision for redemption by the owner or a lienor from the effect of the sale (Gen. Laws 1845-1864; Deady, p. 893, c. 53, relative to the assessment and collection of taxes), and it was much later (February 21, 1887, Laws 1887, p. 89), that it was provided that the deed "shall operate to convey a legal and equitable title," etc. This clause in its present shape is not intelligible, but it is probable that the word "purchaser" is a misprint of "property." At any rate, it is of but little value in determining the proper meaning of the other clauses of the statute alluded to. By the act of 1864 the legislature undeniably intended to inaugurate a radical change in the tax system by foregoing any lien for the taxes assessed, and selling only the estate or interest of the owner in the process of the enforcement of the tax. The same policy prevailed until the act of 1901, with which we have nothing to do. A tax lien can only exist by force and operation of the statute (25 Am. & Eng. Ency. Law, 1 ed., 267; Black, Tax Titles, 2 ed. § 182), the question usually raised in the adjudicated cases being whether enactments are effective for the purpose. But by eliminating the provision for a lien, and declaring that the effect of the sale shall be, not "to vest an absolute title in fee-simple," but to convey the estate or interest of the owner, the policy of the legislature is well indicated that the derivative title to the realty only is subjected to sale for the enforcement of delinquent taxes. The sale and conveyance

in the present instance, therefore, did not operate to cut off or deprive plaintiff of his mortgage lien. The defendant land company became the owner of the equity of redemption, and was a necessary party to the proceedings to foreclose. By reason of having purchased at a tax sale, the purchaser acquired a lien which could not be divested, short of making him a party to the foreclosure, unless there be a redemption. But no lien existed for the tax prior thereto. When, however, the sale ripened into a tax title, the grantee acquired the interest of the owner. In this case such interest was the equity of redemption, and the land company occupies the shoes of the owner upon the foreclosure of the prior mortgage.

Some stress is laid upon section 2818, as indicating a purpose to deal with the fee-simple title. Whatever may be the purpose of that section, it contemplates the issuance of a special warrant upon the order of the county court, but the sale in this instance was not had by virtue of such a warrant.

In our consideration of the cause, we have not overlooked the cases of *Nickum v. Gaston*, 24 Or. 380 (33 Pac. 671, 35 Pac. 31), and *McNary v. Wrightman*, 32 Or. 573 (52 Pac. 510). But in neither of them was the question here involved determined. In the former, the case seems to have been presented upon the assumption by both parties that the tax sale and deed would cut off the lien of the prior mortgage, and what was said by the court must be read in the light of the legal issue involved. The latter case holds that a lienor may pay the tax separately assessed upon a specific parcel of realty, and thereby prevent a sale thereof for the general tax assessed upon all the property of the taxpayer. Mr. Chief Justice MOORE, in his discussion of the effect of Section 2838, Hill's Ann. Laws, 1892, says: "This would seem to imply that, as to a mortgagee or other lienor, the tax was not a general, but, at most, a

specific, charge upon the particular real estate only upon which it was levied." In deciding, however, that the tax is a charge, in the sense that the lienor must pay it if he would avoid a sale for the general tax of the owner, it is nowhere asserted or decided that it is a lien paramount to the mortgage. The case but serves to elucidate the utility of the section, without giving it the effect of requiring the lienor at all hazards to pay the tax and add it to his lien, or be deprived of his remedy for its enforcement. Let the decree of the circuit court be affirmed. AFFIRMED.

Argued 23 June, decided 13 July, 1903.

COLBATH v. HOEFER.

[78 Pac. 10.]

GARNISHEE'S CONTRACT TO HOLD GARNISHED PROPERTY.

1. A receipt acknowledging that receiptors, who were garnishees in an action against A, had "received from C, sheriff, all the hops raised by A on our land," is an admission that the sheriff had possession of the hops in his official capacity, and that A owned them.

PLEADING — BREACH OF CONTRACT TO RETURN ATTACHED PROPERTY.

2. Where a receipt given to a sheriff by garnishees acknowledged the receipt of property of the judgment debtor, which receiptors agreed to hold until ordered "to release the same" by the sheriff, an allegation in the complaint in an action by the sheriff for breach of the contract to return the property, that plaintiff had demanded possession of the property, which receiptors refused and still refuse to deliver, was sufficient, after answer, as an allegation of breach of the agreement to return the property.

ESTOPPED BY CONDUCT.

3. Where a receipt given by garnishees acknowledged that receiptors had received certain property of the judgment debtor from the sheriff, which they agreed to hold until released by the sheriff, they were estopped, in an action by the sheriff for breach of the agreement to return the property, from showing that the property had never been in their possession, or that the sheriff had never levied on the property or taken possession thereof.

From Marion: GEORGE H. BURNETT, Judge.

The plaintiff for a cause of action sets up, in substance: That he is now, and has been during the times mentioned herein, the duly elected, qualified, and acting Sheriff of Marion County, Oregon; that defendants, who are co-partners, on or about the twenty-fourth day of September, 1902, received from him about one hundred and thirty-six

bales of hops, in Marion County, Oregon, weighing 25,840 pounds, of the reasonable value of \$6,460, for which they gave him a receipt in words and figures as follows:

"G. Muecke,

v.

Ah Lee.

Champoeg, Sept. 24, 1902.

Received of B. B. Colbath, Sheriff of Marion County, all the hops raised by Ah Lee on our land near Champoeg, in Marion Co., Or., and agree to hold the same for the said sheriff until ordered to release the same by said sheriff. Damages by the elements excepted.

HOEFER & ZORN."

It is further alleged that at said time the plaintiff was acting in his official capacity as sheriff; that the receipt includes all the hops raised by Ah Lee on defendants' land; that on or about November 22, 1902, he demanded possession of said hops from defendants, which they refused, and still neglect and refuse to deliver the same to plaintiff, to his damage in the sum of \$6,460. The prayer is for the sum named, with costs and disbursements.

Defendants answered, denying all the material allegations of the complaint, except that plaintiff was and is the sheriff of Marion County and the giving of the receipt, and for a further defense alleging, in substance: (1) That on said twenty-fourth day of September, 1902, the plaintiff as such sheriff served a notice of garnishment upon them on an execution issued out of the circuit court of Marion County, in the case of *G. Muecke v. Ah Lee and Dan McCann*, upon a judgment therein in favor of Muecke and against Ah Lee, for the sum of \$441.16, with accrued interest, and the further sum of \$14 costs, whereby the sheriff attempted to garnishee certain hops claimed by Muecke to belong to Ah Lee, but which were not then and never had been in the possession of said defendants, or either of them; (2) That plaintiff, as sheriff, then represented to

Hoefer, one of the defendants, that if he would sign the receipt it would be a sufficient return to the garnishment, and would save plaintiff the trouble and expense of taking said hops into his possession; and said defendant, not being advised as to the correct and proper manner of making return upon said garnishment, and relying upon said statement of plaintiff, signed the receipt, but that plaintiff in fact never levied upon said hops at the time in the possession or under the control of either of said defendants.

The plaintiff moved to strike out each of these two paragraphs, and others of the separate defense, but was unsuccessful as to these. The reply as to the first paragraph denies the allegation that said hops were not in the possession of the defendants, or either of them, on the said twenty-fourth day of September, 1902, and, as to the second, specifically each and every allegation thereof.

Upon this state of the pleadings the defendants moved for judgment thereon, and prevailed; and, judgment having been entered dismissing the action, the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. William H. Holmes* and *Mr. Webster Holmes*.

For respondents there was a brief over the names of *William M. Kaiser* and *Woodson T. Slater*, with an oral argument by *Mr. Slater*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

The questions presented by this record are novel and of first impression in this court. The action is in the nature of assumpsit, to recover damages for a breach of contract, and the primary question presented is whether the complaint states facts sufficient to constitute a cause of action. The objection coming, as it does, after answer, the test will be, as frequently announced by this court, whether

the complaint will support a verdict. The specific objections made to it are (1) that it does not state who was the owner of the hops at the time, or what right or interest, if any, the plaintiff had therein; and (2) that the allegation that plaintiff demanded of defendants a surrender of the possession of the hops, and that defendants refused to deliver the same to him, is not a sufficient assignment of a breach of the terms of defendants' agreement "to hold the same for the sheriff until ordered to release the same by said sheriff."

Some general observations relative to the nature of such contracts and the principles upon which their validity is based and sustained are necessary to a full understanding of the conclusions at which we have arrived. They seem to have been in general use in the New England states and a few others, but are not without precedent elsewhere. It is said that they are "usually absolute and unconditional in their terms, and conclusive in respect of their recitals and admissions, but are nevertheless, by operation of law, contingent": Murfree, Sheriffs, § 660. They frequently run in the alternative—to return the property upon demand, or pay the value thereof, or pay the amount of such judgment as may be recovered in the action—but may be drawn for a return only. The officer has no personal interest in the property or in its possession. He holds it as an officer of the law and for the purposes of the law. His right to enforce the promises of the receptor rests in his liability to the creditor during the existence of the lien, and to the debtor when that lien is discharged: *Bangs v. Beacham*, 68 Me. 425. The consideration going to the support of such an agreement is the release of the property for the time being for the use and benefit of the judgment debtor, or its delivery to the bailee upon the faith of his promise to return it when it is desired to subject

the same to process in the action: *Clark v. Gaylord*, 24 Conn. 484.

The receiptor's liability is to be determined by the terms of the contract, and whether he is estopped to show that the property belonged, not to the debtor, but to some third party, depends upon whether it is a contract of indemnity, or an express assurance for a certain amount or value, whereby he assumes an absolute liability, or a mere contract of bailment for the safe keeping and return of the specific chattels. If the former, he could not be allowed to prove title in a third person; but if, on the other hand, the contract be one of bailment only, then he may always excuse himself for nondelivery by showing that the property was that of a third person, and not of the debtor. But he must further show that it has been delivered to the true owner in obedience to the paramount title: *Mason v. Aldrich*, 36 Minn. 283 (30 N. W. 884); *Lathrop v. Cook*, 14 Me. 414 (31 Am. Dec. 62); *Penobscot Boom Corp. v. Wilkins*, 27 Me. 345; *Clark v. Gaylord*, 24 Conn. 484. The reason for the rule is that the sheriff could not be made liable in an action by the plaintiff in the writ for not levying upon property not that of the judgment debtor, and the person having the paramount title may take it from him as well as from the receiptor, which would be the end of the controversy so far as the property is concerned: *Learned v. Bryant*, 13 Mass. 224; *Fisher v. Bartlett*, 8 Me. 122. Nor will he be permitted to show that the property was not at the time of the attempted levy and delivery of the receipt, or never had been, in the possession of the defendants in the writ; and upon the same principle he will not be permitted to show that the property was not in his possession, or that no sufficient levy of the writ had been made by the officer having it in charge for execution: *Bangs v. Beacham*, 68 Me. 425; *Spencer v. Williams*, 2 Vt. 209 (19 Am. Dec. 711); *West v. Thompson*, 27 Vt. 613; *Jewett v.*

Torrey, 11 Mass. 219; *Lyman v. Lyman*, 11 Mass. 317; *Hunter v. Peaks*, 74 Me. 363. With these observations, we will recur to the questions presented.

1. The contract in controversy is one of simple bailment. It runs: "Received of B. B. Colbath, Sheriff of Marion County, all the hops raised by Ah Lee on our land." This is an acknowledgement of plaintiff's possession of the hops as sheriff, and, having been raised by Ah Lee upon the land of defendants, one would naturally suppose or infer that Ah Lee was the owner, and such is the reasonable interpretation of the contract.

2. The contract, it must be admitted, is inartistically drawn as it respects defendants' agreement touching a relinquishment of the property. They were to hold it until ordered to release the same by the sheriff. The sheriff had, as we have seen, delivered it to the defendants. The receipt or contract is an acknowledgment of this, and when the parties used the term "release" it must have been in the sense of a return or redelivery to the sheriff. He would be entitled to it, either to satisfy his writ or to return it to the defendants. So we are constrained to hold that the complaint contains a sufficient assignment of a breach of defendants' undertaking. This disposes of the contention of the respondents respecting the motion for judgment on the pleadings, and, being untenable, the motion should have been overruled.

3. There is another assignment of error important to be considered in deciding the controversy, which is with reference to the overruling of plaintiff's motion to strike out the first and second paragraphs of defendants' first separate defense. The purpose of these paragraphs, as we construe them, was to show (1) that the hops were not at the time of the execution of the receipt, or at any time previous thereto, in the possession of the defendants in this action; and (2) that plaintiff had never in fact levied

upon any of said hops, or taken them into his possession. Within the principles hereinbefore announced, by acknowledging receipt of the property from the sheriff the defendants have estopped themselves to aver that it was not in their possession at the time, or that the sheriff had not made the proper levy or service of garnishment. If the hops were not in their possession at the time, they should have made their answer accordingly, and thus relieved themselves entirely of responsibility, or, if there had been no garnishment, they were not obliged to make any answer. But by entering into the contract of bailment, in the absence of fraud or misrepresentation on the part of plaintiff (the answer disclosing naught to the contrary), they are precluded from showing these things, because there was an express admission the other way, upon which the sheriff relied, and was thereby induced to change his position, and refrain from further levy of the writ and the exercise of further diligence in quest of property to satisfy the execution. See, also, *Cornell v. Dakin*, 38 N. Y. 253; *Burk v. Webb*, 32 Mich. 173. We hold, therefore, that there was error in not sustaining the motion to strike out these two paragraphs of the answer also. In accordance with these considerations, the judgment will be reversed, and the cause remanded, with directions to sustain the motion to strike out the two paragraphs of the separate defense alluded to, and for such further proceedings as may seem proper.

REVERSED.

Argued 1 July, decided 20 July, 1908.

CLINE v. SHELL.

[73 Pac. 12.]

IMPLIED MODIFICATION OF BUILDING CONTRACT.

1. A provision in a contract for the construction of a building, requiring the contractor to furnish the hardware, is impliedly modified where the owner of the building, in the presence and with the consent of the contractor, purchased the hardware on his own account, and requested plaintiff, the seller, to charge the goods to him.

EVIDENCE OF BIAS OF WITNESSES.

2. The evidence satisfies the court that the leading witnesses on each side in this case are interested in the result, and no one of them has an advantage over any other one in that respect.

EVIDENCE AS TO PURCHASE OF LIENABLE ITEMS.

3. In this suit to foreclose a mechanics' lien for hardware furnished by plaintiff for use in the erection of defendant's building, the evidence fairly shows that defendant purchased from plaintiff the entire bill of goods charged to him.

EVIDENCE OF VALUE OF LIENABLE ITEMS.

4. The evidence sustains the finding by the trial court as to the reasonable value of the hardware for which the lien is claimed.

NOTICE OF LIEN—AGENCY OF CONTRACTOR.

5. Where the owner of a building, according to the contractor's testimony, asked the contractor whether, if he bought some sheathing paper, he (the contractor) would put it down so as to prevent the floors being injured, and the contractor replied "Yes," and the owner thereupon said, "Well, get it here, and I will pay for it," whereupon the contractor ordered it for plaintiff, and the contractor's statement was corroborated by the owner himself, it sufficiently appeared that the contractor was the owner's agent in ordering the paper, and plaintiff's notice of lien properly included that item.

From Multnomah: MELVIN C. GEORGE, Judge.

Suit by C. C. Cline against L. J. Shell to foreclose a lien for materials, resulting in a decree for plaintiff; hence this appeal. .

AFFIRMED.

For appellant there was a brief over the name of *Gammans & Malarkey*, with an oral argument by *Mr. Daniel J. Malarkey*.

For respondent there was a brief and an oral argument by *Mr. Andrew T. Lewis*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit to foreclose a mechanics' lien. It is alleged in the complaint that between March 30 and November 1, 1901, the plaintiff, at the special instance and request of the defendant, furnished and delivered certain hardware, of the reasonable value of \$574.02, to be used in the erection of his building in the City of Portland, Oregon, no part of which sum has been paid except \$300. It is further stated that, within the time prescribed by law, plaintiff filed in the proper office a notice of lien to secure the unpaid balance of \$274.02; that he paid one dollar for recording

said lien, and that \$50 is a reasonable sum as attorney's fees in this suit. The answer having denied the material allegations of the complaint, a trial was had, and, from the testimony taken, the court found that the reasonable value of the hardware furnished was only \$520, and that there remained due on account thereof \$220, with interest thereon from November 9, 1901, at 6 per cent per annum; that one dollar had been paid for recording said lien notice; that \$50 was a reasonable sum as attorney's fees; and, a decree having been rendered in accordance therewith, the defendant appeals.

It is admitted that the hardware was used in the defendant's building, and that the lien notice was filed within the time limited therefor, and the only questions to be considered are whether the material was furnished to the defendant, and, if so, is the sum demanded the reasonable value thereof? It is contended by defendant's counsel that the hardware was furnished to one G. L. Vanderhoof, who, as contractor, erected the said building for defendant, and that, the relation of creditor and debtor never having existed between the plaintiff and their client, the court erred in rendering the decree complained of. The transcript shows that on March 30, 1901, the defendant, being the owner of certain real property in Couch's Addition to said city, entered into a contract with Vanderhoof, by the terms of which the latter agreed, in consideration of the payment of \$10,350.40, to furnish the necessary material and labor and to erect a building on said premises, and to surrender the same, free from liens, on or before August 1, 1901. The specifications contain the following clause: "Allow \$300 for furnishing hardware. The contractor is to furnish and fix the hardware in place."

1. The testimony shows that, though the plaintiff deals in ordinary builders' hardware, he did not keep in stock the styles desired by the defendant, who, in pursuance of

an invitation, visited plaintiff's store about May 25, 1901, where he examined samples of hardware displayed by an agent of an Eastern manufacturing company, and made selections therefrom, duplicates of which the plaintiff ordered, and upon their arrival sent them to the building under construction, where they were used. The plaintiff testifies that he sold the hardware to the defendant, who told him to charge him therewith. Vanderhoof was present when the hardware was selected, and, as plaintiff's witness, testifies that Shell bought it. He also says that he told Shell at the time that the bill for the goods chosen would exceed \$300, the price stipulated therefor in the specifications, and the latter replied that he was buying the hardware and would pay the excess, whatever it was. J. B. Finnegan, plaintiff's bookkeeper, who was present when the samples of hardware were exhibited, testifies that Vanderhoof then said: "'Well, Mr. Shell, you understand that I am to allow \$300 for the hardware, and if what you buy exceeds that you will have to pay for it,' and he said, 'Yes, I understand.'" This witness also says that Shell purchased the hardware. H. C. Ross, the agent who displayed the samples, testifies that through the plaintiff he sold the hardware to Shell, and on cross-examination, in answer to the question, "Then you were really making the sale for Mr. Cline?" replied, "That is the idea." The defendant, as a witness in his own behalf, testifies that he did not buy any hardware for his building, or agree to pay plaintiff for any such material used therein. Richard Martin, Jr., an architect, who prepared the specifications for the defendant's building, referring to the clause thereof hereinbefore quoted, testifies that it meant that Vanderhoof was to furnish the necessary hardware, the right to select the styles desired having been reserved by the defendant, who was required to pay the excess if the value of the material chosen exceeded \$300, but if it did not equal

that sum he was to be credited on the contract price of the building with the difference. The contract entered into between the defendant and Vanderhoof for the construction of the building provides that, if any dispute should arise respecting the true meaning of the specifications, the same was to be referred to Martin, whose decision was to be final and conclusive. It is argued by defendant's counsel that this provision of the contract cannot be construed to mean that the defendant was required to buy the hardware. The plaintiff was not a party to the contract referred to, and therefore is not bound by any of its provisions. Vanderhoof may have been required to furnish the hardware, but even if the stipulation were so construed it is not immutable, and if the defendant, in his presence and with his consent, purchased the hardware on his own account, and requested the plaintiff to charge the goods to him, the clause in the specifications would be modified in that particular.

2. It is also argued by defendant's counsel that the business relations existing between Vanderhoof and the plaintiff were such as to show conclusively that they were mutually interested in maintaining the latter's theory of the case, thereby discrediting their testimony. The transcript shows that, Vanderhoof having been required to give a bond for the faithful performance of his part of the contract, a guaranty company became his surety, but, as a condition precedent thereto, the plaintiff executed an undertaking in which he stipulated to indemnify said company against any loss that it might sustain in consequence of the liability incurred. The plaintiff, however, as a means of protection against the possibility of loss that might result from the obligation assumed, received all payments made by the defendant upon the contract, credited Vanderhoof the amount thereof, and applied it in discharging claims for material and labor. The plaintiff and

Vanderhoof were undoubtedly interested in the completion of the building, and are probably concerned in the maintenance of this suit, but as the defendant does not claim to have paid more than \$300 for the hardware used in his building, and as he evidently desires to defeat the foreclosure of the lien, he is not a disinterested witness, and therefore possesses no advantage superior to the plaintiff in this regard.

3. It is also insisted that an inspection of the entries made in plaintiff's books, copies of which are included in the transcript so far as they relate to said hardware, conclusively show that when ordered it was treated by plaintiff as having been sold to Vanderhoof, but after the time limited for the completion of the building the account was changed so as to charge it to the defendant, and that such change is a circumstance contradictory of plaintiff's testimony that the hardware was sold to the defendant, and conclusively shows that an error was committed in decreeing a foreclosure of the lien. The first entry concerning the hardware was made May 25, 1901, at page 437 of plaintiff's daybook, and is as follows: "G. L. Vanderhoof's List for Schell, 16th and Couch;" then follows a list of articles, but no prices appear opposite thereto, except "8 Set Front Door Lock from H. DeH. and C. @ \$6.95." Under date of July 6th of that year, an entry is made in another daybook, at page 109, as follows: "Geo. L. Vanderhoof, 4 pr. 3x3 Jap Steel Butts; 4 Set Rim Lox, chgd on Schell's bill." Five days thereafter the following entry appears at page 129, to wit: "Geo. L. Vanderhoof, 16 and Couch. 8 Rolls Grey Economy, 75, 6.00. The above is an error chgd to L. J. Shell." On August 21, 1901, at pages 287 to 290, inclusive, of the daybook, under the caption, "Geo. L. Vanderhoof, 16—Couch St. Job," many entries appear, and among them the following: "Sash weights; sash cord; * * Trim Hdw. to am't. of \$300." The total charge is

\$4,704.44, below which is written: "It is agreed that we furnish bill for above price. Anything added thereto to be charged at same rate and anything deducted at the same rate." The plaintiff's ledger account with "Geo. L. Vanderhoof—Schell Flats," at pages 90, 118, and 137 shows that the entries in the daybook hereinbefore mentioned are copied therein, one of which will illustrate the method pursued: "May 25, 1901, Mdse. Folio 437. Dr. 00. Cr. —." Notwithstanding the entry in the daybook in respect to the charge of six dollars is stated to be erroneous, it is carried into the ledger as a charge against Vanderhoof. Entries of charges against the defendant appear in plaintiff's daybook, at page 202, on July 30, 1901, of four items, but no values are set down. Similar entries appear at pages 243, no date being given; 343, September 5, 1901; 375, September 14, 1901; 422, no date stated; 437, September 30, 1901; and 485, 486, October 10, 1901, when the articles charged in the preceding entries are recharged and the prices carried out, the total value being \$573.72, and a credit of \$300 allowed, leaving \$273.72 due, which was thereafter increased by a charge of eighty cents entered on October 15, 1901, at page 5, evidently another daybook. The summary of these entries is copied in plaintiff's ledger under the title "L. J. Schell, 16 and Couch," the first six containing no charges, but those of October 10 and 15, 1901, being \$273.72 and eighty cents respectively. A credit of fifty cents appears in the ledger under date of December 31, 1901, thus showing \$274.02 due.

The plaintiff, illustrating his method of preserving a record of his business, testifies that he keeps an estimate book in which is noted articles desired by his customers, from which orders therefor are filled or given, and that, Vanderhoof having made out and delivered to him a list of the hardware selected by the defendant, it was not en-

tered in the estimate book, but in the daybook. He further says that, having agreed with the defendant that when all the hardware had been furnished the entire sum demanded therefor should be charged, he directed his bookkeeper not to mark the price of the articles sent to defendant's building, but to keep a memorandum thereof and to put all the items into one bill, making the prices thereof reasonable. His testimony is corroborated by that of his bookkeeper, Finnegan, who, in explaining why no prices were set opposite the items constituting the first six entries of the defendant's account as it appears in the ledger, testifies that, all the hardware not having been delivered at one time, the plaintiff told him that when it was all sent to the defendant's building to charge him therewith, and that he adopted this method of keeping the books so that he might refer to what had been delivered. This witness, on cross-examination, was asked the following question: "Is it not a fact that you never charged Mr. Shell more than \$273 worth of hardware?" to which he replied: "That is all that is carried out in the ledger; yes. Q. And the balance was charged to Mr. Vanderhoof? A. It might be so interpreted. We charged Vanderhoof \$300 for the credit allowed Mr. Shell. We could not give Mr. Shell credit for it without receiving it from some source." Though Finnegan's testimony is true that the entry of \$273 is the only charge against the defendant as disclosed by the ledger, the daybook, however, from which the entry was transcribed, shows that he was charged with hardware in the sum of \$573.72, and credited with \$300 paid on account thereof by Vanderhoof, but by no reasonable interpretation can it be said that any part of the hardware was charged to Vanderhoof. It is true that the schedule prepared by him was entered in the daybook under the caption, "G. L. Vanderhoof's List for Shell, 16th and Couch," but no value is set opposite any article specified therein, except the front

door locks. The entry in this manner is compatible with, and seems to support, plaintiff's testimony that the schedule of articles selected was noted in the day, instead of the estimate, book. We think the testimony of the plaintiff, corroborated as it is by that of his bookkeeper, overcomes any inference that might be drawn from the appearance of the books, and that the preponderance of the whole testimony shows that the defendant purchased from the plaintiff the entire bill of hardware charged to him.

It will be remembered that the specifications provided that \$300 was to be allowed for hardware, and the testimony shows that this sum was included in the contract price for the construction of the building. The defendant having purchased the hardware, as we have found, Vanderhoof must have received this money to his use. The plaintiff testifies that, when the hardware was selected, Vanderhoof said in the defendant's presence that he would pay \$300 on account thereof. He further says: "Vanderhoof was to allow \$300, and I knew the money was being paid to the store, and naturally all I had to do was to charge it up to him, as I did in the original bill." Vanderhoof, in speaking of this matter, testifies as follows: "My understanding was that when the hardware was bought I was to put it in place, and I was to pay \$300 on it; that is the way I figured on the contract, that I was to pay \$300 on furnishing the hardware. Q. Did you pay \$300? A. I paid \$300. At least, I told Mr. Finnegan to charge me that on my account." We think Vanderhoof's declaration made in the defendant's presence, without objection, that he would pay \$300 on account of the hardware, warrants us in concluding that the defendant authorized an application of the money in the manner pursued, though the credit therefor was not entered upon the books until August 21, 1901.

4. This brings us to a consideration of the value of the material furnished. The plaintiff testifies that the prices

charged for the articles furnished by him to the defendant were reasonable, and his testimony in this particular is corroborated by that of Ross, the agent through whom the hardware was secured, and also by that of Vanderhoof. B. O. Wood, a clerk for a hardware company, as defendant's witness, testifies that he has had thirteen years' experience in the general hardware business, and, having examined the specifications of hardware used in the building constructed by Vanderhoof, he estimated the reasonable value thereof to be \$462.20, and on cross-examination gives a detailed statement of what he considers to be the value of the several items. Walter B. Honeyman, of the Honeyman Hardware Company, of Portland, who is experienced in the business, having visited the building constructed by Vanderhoof and carefully examined the hardware used therein, appearing as defendant's witness, and his attention being called to the charge of \$574.02, was asked on direct examination: "Are you able now to state what in your opinion is the reasonable value of that hardware as a whole?" and replied: "I think that is reasonable enough, considering we are in the wholesale business. We buy goods a great deal cheaper than Mr. Cline does, and he buys his goods from wholesalers and pays a profit on them. I do not see why that would not be reasonable on them. The waybills of hardware have been sold in this town for the last three years; nobody has made a profit on it, and there is not fifteen per cent made on them. Nobody can afford to sell goods at the price Mr. Woods stated." He also testifies concerning the value of many of the articles included in plaintiff's bill, showing that the prices charged therefor are reasonable, and, referring to certain butts and screws which Wood testified he could sell at ten cents each, says: "Mr. Wood cannot buy those hinges for less than thirty-two cents a pair laid down here." We are satisfied that the prices for the hardware are reasonable, but the

court having allowed therefor only \$220, instead of \$274.02, the sum demanded, and the plaintiff not having insisted thereon at the trial herein, the decree in this respect will not be disturbed.

5. It is contended by defendant's counsel that the lien notice does not contain a true statement of the account, because it includes an item of "8 rolls sheathing paper, \$6," which it is argued the defendant did not order, nor authorize Vanderhoof to purchase for him. In speaking of this matter, Vanderhoof testifies that, to prevent the floors from being injured by the adamant plastering, with which he had nothing to do, the defendant, referring to the paper as the proper means for this purpose, inquired of him, "You will put it on if I buy it?" to which he replied, "Yes," and the defendant said, "Well, get it up here, and I will pay for it," whereupon he ordered it by telephone from the plaintiff. The defendant corroborates this statement in every particular, for he says: "During the time the plasterers were up there, the adamant man was making a terrible muss on the floors, and Mr. Martin and Mr. Vanderhoof were there, and I spoke to them and said I wished we could do something to save those floors a little, and they all agreed with me that they were making a terrible muss on the floors, and I said: 'Well, couldn't we do something? Couldn't we put down some kind of paper or something on the floor to protect it?' and Mr. Martin says, 'Yes, you can put down building paper.' 'Well,' I said, 'It won't be very expensive, will it?' and he said, 'No, it won't cost much;' and finally Mr. Vanderhoof spoke up and he says, 'If you will get the paper I will have it put down;' and he says, 'I don't know what it will cost, but it won't cost much;' and he says, 'I will go down and telephone and see what it will cost;' so he went away, and came back, and he says, 'It will cost six bits a roll.' 'Well,' I said, 'How many rolls will it take?' He says, 'I think it will take about eight.'

'Well,' I says, 'you better order it, I think.' He says, 'If there is, you can't tell exactly whether it will take eight rolls or less; but if there is any left I will take it back, and if it requires any more we will have to order more.' 'Well,' I says, 'that is all right.' He says, 'I think eight rolls will do it;' so I says, 'You better order it.' That is about all there was of that, that I remember about." No doubt can possibly exist that Vanderhoof was thereby created defendant's agent in ordering this paper, which was sold and delivered to the latter by his express order, and the contention that the notice of lien does not contain a true statement of the account is without merit.

Having examined the testimony with great care, we conclude that the decree should be affirmed, and it is so ordered.

AFFIRMED.

Decided 20 July, rehearing denied 15 October, 1903.

RANDALL v. LINGWALL.

[73 Pac. 1.]

VENDOR AND PURCHASER — POSSESSION OF TENANT AS NOTICE.

1. The possession of a tenant of real property is of itself sufficient to put an intending purchaser from a third person upon inquiry as to the landlord's title, and to charge him with constructive notice of such facts as might have been discovered by reasonable diligence.

EVIDENCE AS TO EXISTENCE OF TENANCY.

2. Decedent deeded land to his brother, who later reconveyed to decedent. The latter deed was not recorded, but decedent took possession, and later leased the land to a third person. The tenant paid the rent to decedent until the latter's death, after which the brother, having learned that his deed to decedent was not of record, notified the tenant that he owned the land, and demanded payment of rent, which the tenant accordingly paid to him for two months in order to avoid controversy, and without informing the decedent's representatives. *Held*, that the tenant still remained tenant of decedent, so that his possession was sufficient to put an intending purchaser of the property on inquiry as to decedent's rights.

EFFECT OF NOT INQUIRING OF STRANGER IN POSSESSION.

3. A purchaser of property, failing to make inquiry of a stranger in possession, is in law chargeable with bad faith, and cannot claim the rights of a *bona fide* purchaser: *Crossen v. Oliver*, 37 Or. 514, distinguished.

IDEM.

4. A purchaser from one apparently holding the legal title, who has not made any inquiry of the tenant in possession, is not in a position to urge that the inquiry, if made, would probably not have disclosed the rights of equitable claimants.

RULE WHERE GRANTOR RETAINS POSSESSION.

5. The rule that the continued possession of land by the grantor in a conveyance thereof is not notice to a *bona fide* purchaser from the grantee of any rights of such grantor, is not applicable where such grantor has not personally retained possession.

From Marion : REUBEN P. BOISE, Judge.

Suit by Bessie Randall and Bessie O. Randall, a minor, by Bessie Randall, her general guardian, against C. G. Lingwall. Decree for plaintiffs. Defendant appeals.

AFFIRMED.

For appellant there was an oral argument and a brief by *Mr. John H. Hall* to this effect:

I. A court of equity acts upon the conscience, and it is upon the ground of *mala fides* that a purchaser for value is affected with notice of a prior claim. The notice must be more than would excite the suspicion of a cautious and wary person; it must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property: *Raymond v. Flavel*, 27 Or. 219-246 (40 Pac. 158); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3); *Crossen v. Oliver*, 37 Or. 514-521 (61 Pac. 885); *Lyons v. Leahy*, 15 Or. 8-11 (3 Am. St. Rep. 133, note, 13 Pac. 643); *Laubridg v. Bowland*, 52 Miss. 546-553; *Vest v. Michie*, 31 Gratt. 149 (31 Am. Rep. 722); *Garnier v. Wheeler*, 40 Or. 198 (66 Pac. 812); *Advance Thresher Co. v. Esteb*, 41 Or. 469 (69 Pac. 447); *Hall v. Livingston*, 3 Del. Ch. 348.

II. A purchaser from a vendee whose vendor remains in possession is not bound to inquire further as to the title when he finds on record a deed from such vendor, properly conveying the title to the person from whom he is about to purchase: *Exon v. Dancke*, 24 Or. 110-115 (32 Pac. 1045), and cases cited.

III. The possession of a tenant is not notice of his landlord's title: *McCleerey v. Wakefield*, 76 Iowa, 529 (2 L. R. A. 529, 41 N. W. 210); *Smith v. Dall*, 13 Cal. 510-511; 2 Sugden, Vendors, 558; Wade, Notice, § 273.

IV. General rumor of a fact is not sufficient to place a party on inquiry; there must be some act or declaration from an authenticated source: *Raymond v. Flavel*, 27 Or. 219-245 (40 Pac. 158); *Maul and Wife v. Rider*, 59 Pa. St. 167; *Kerns v. Swope*, 2 Watts (Pa.), 75; *Jackson v. Given*, 8 Johns. 137 (5 Am. Dec. 328); *Church v. Guernsey*, 39 Pa. St. 84-86; *Satterfield v. Malone*, 35 Fed. 445 (1 L. R. A. 35).

V. The payment of rent by the tenant to one holding the record title constitutes a valid attornment: *Leitch v. Boyington*, 84 Ill. 179; *Flagg v. Gillmacher*, 98 Ill. 293; *Hayes v. Lawver*, 83 Ill. 182.

For respondents there was a brief over the names of *Woodson T. Slater*, *William M. Kaiser*, and *Tilmon Ford*, with an oral argument by *Mr. Slater* and *Mr. Ford*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to quiet title. The plaintiffs are the widow and daughter of O. P. Randall, who died in February, 1898. In March, 1888, O. P. Randall purchased the property in controversy, conveying it soon after by warranty deed to his brother, T. J. Randall, which deed was duly recorded. Some time in 1891, the latter reconveyed the property to O. P. Randall. This deed was not recorded, but the grantee took possession, and, in 1893, leased the property to G. G. Gans, who continued in possession until the commencement of this suit, and who paid the rent under his lease to O. P. Randall until the latter's death. T. J. Randall, ascertaining that his deed to his brother was not of record, then notified Gans that he owned the property, and demanded payment of the rent, which Gans accordingly paid him for the months of March and April, 1898, in order to avoid any controversy about his right to the possession, but without informing any of the representatives of O. P. Randall. On April 12, 1898, T. J. Randall sold and conveyed the property to the defendant, who, before making the purchase,

examined it, saw that Gans was in possession, but made no inquiry of him or of any member of his family as to the character of such possession, or his right thereto, but relied entirely upon an abstract of the title. In December, 1898, the deed from T. J. to O. P. Randall was found, and placed of record. Thereafter this suit was brought. Upon this state of facts, it is apparent that the plaintiffs must prevail unless the defendant is entitled to the rights of a *bona fide* purchaser. This depends upon whether his knowledge of Gans' possession was, under the circumstances, sufficient to put him upon inquiry, and to charge him with notice of the rights and equities of the plaintiffs.

The inquiry thus presented is twofold: *First*, is the possession of a tenant notice of the title of his landlord, or perhaps, more accurately speaking, is it sufficient to put an intending purchaser upon inquiry, and to charge him with notice of the landlord's title where he makes no inquiry? *Second*, was Gans the tenant of O. P. or T. J. Randall at the time of the defendant's purchase?

1. It seems to be well settled that the open, exclusive, and notorious possession of property by a stranger to the title is sufficient to put those who deal with it upon inquiry concerning the rights and equities of the party in possession, and to charge them with knowledge thereof when no inquiry is made: *Bohlman v. Coffin*, 4 Or. 313; *Rayburn v. Davisson*, 22 Or. 242 (29 Pac. 738); *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. 158); *Ambrose v. Huntington*, 34 Or. 484 (56 Pac. 513). But whether such notice is confined to the rights and equities of the party in possession, or extends to those under whom he holds if he is a tenant, is a disputed question. Mr. Sugden, in his work on Vendors, says: "Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of a lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person

having the legal estate sells to a person who purchases *bona fide* and without notice of the equitable claim, the purchaser will hold against the equitable owner, although he had notice of the tenant being in possession": 2 Sugden, Vendors, 560. The doctrine of Mr. Sugden was followed by Mr. Justice STORY, in *Flagg v. Mann*, 2 Sumn. 486, 530 (Fed. Cas. No. 4,847), wherein he held that constructive notice from possession does not extend beyond the title of the party in possession, although the learned justice substantially admitted that the rule is supported only by the ability of the author. Upon the *dictum* of Mr. Sugden, and the decision of *Flagg v. Mann*, the rule is taken for granted in *Beatie v. Butler*, 21 Mo. 313 (64 Am. Dec. 234), and *Smith v. Dall*, 13 Cal. 510. The latter case, however, was subsequently overruled in *Dutton v. Warschauer*, 21 Cal. 609 (82 Am. Dec. 765), and the opposite doctrine is the law in Iowa, Illinois, New York, Nebraska, North Carolina, Wisconsin, Pennsylvania, Minnesota, and California: *Dickey v. Lyon*, 19 Iowa, 544; *Mallett v. Kaehler*, 141 Ill. 70 (30 N. E. 549); *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Conlee v. McDowell*, 15 Neb. 184 (18 N. W. 60); *Edwards v. Thompson*, 71 N. C. 177; *Wickes v. Lake*, 25 Wis. 71; *Wright v. Wood*, 23 Pa. 120; *Woods v. Farmere*, 7 Watts, 382 (32 Am. Dec. 772); *Morrison v. March*, 4 Minn. 422; *Thompson v. Pioche*, 44 Cal. 508; *Fair v. Stevenot*, 29 Cal. 486. The question was considered by Mr. Justice COLE in *Dickey v. Lyon*, 19 Iowa, 544, and reference is made to the opinion in that case for an able and exhaustive discussion of the subject, in the light of both principle and authority. The conclusion reached by him was that "a person who purchases an estate in the possession of another than his vendor is in equity, that is, in good faith, bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity charges

him with notice of all the facts that such inquiry would disclose. Suppose the possessor is a tenant holding under a lease; an inquiry of such tenant would advise the purchaser, not only of the length of time and terms of tenancy, but also of the landlord, and hence that some other person than his proposed vendor claimed a right to the estate, and was holding possession thereof by his tenant. Being thus advised, equity, in vindication of ordinary good faith, requires him to ascertain the extent of right of such landlord in the estate." This doctrine is supported by the overwhelming weight of authority, and it may, we think, be regarded as practically settled, in this country, that the possession of a tenant of real property is sufficient to put an intending purchaser on inquiry. From that fact alone he will be charged with notice of the landlord's title, unless it be shown that he pursued the inquiry with reasonable diligence, and failed to acquire knowledge of such title. Indeed, as said by Mr. Chief Justice FIELD, in *Dutton v. Warschauer*, 21 Cal. 609 (92 Am. Dec. 765): "It is not easy to give to the fact of possession any influence as notice without making it notice of all such matters as a prudent man, desirous of purchasing the property, would naturally inquire about respecting the title. Ascertaining that the possession of the occupant is that of a tenant, he would, in the ordinary course of things, proceed to inquire as to the title of the landlord." The possession of Gans was therefore sufficient to put the defendant upon inquiry, and to charge him with notice of the title under which Gans was holding at the time of his purchase.

2. This brings us to an examination of the second branch of the question. If the relation of landlord and tenant between O. P. Randall and Gans had ceased, and such a relationship had been established between T. J. Randall and Gans prior to the time of defendant's purchase, the latter's possession would have been notice only

of the title under which he was then holding, and not of the rights of his previous landlord. It is therefore important to ascertain whether he had ceased to be the tenant of O. P. Randall. From the facts it appears that Gans did not surrender possession to T. J. Randall, or make a new lease with him, nor did he notify the successors in interest of O. P. Randall of the demand made upon him for rent, or of an intention to attorn to T. J. Randall. All he did was to pay the latter rent for March and April. The mere payment of rent, however, is not of itself sufficient to establish the relation of landlord and tenant. It is but evidence of such a relationship, and often satisfactory as such. But where one in possession of property under a lease from one person agrees to and does pay the rent to another, such payment, if made under a misconception of the facts, does not create the relation of landlord and tenant between him and the payee. In order for mere payment of rent to constitute a tenancy, it must be paid in the capacity of a tenant. If paid in any other capacity, it does not have that effect: Wood, Landl. & Ten. § 4; 1 Taylor, Landl. & Ten. (8 ed.) § 23; *Strahan v. Smith*, 4 Bing. 90; *Gregory v. Doidge*, 3 Bing. 473; *Doe d. Higginbotham v. Barten*, 11 Adolph. & Ell. 307. It is therefore doubtful, under the facts, whether the payment of rent by Gans to T. J. Randall operated as an attornment, or estopped him from denying Randall's title. But if it be assumed that such was the effect of the arrangement between them, it still did not destroy the relation of landlord and tenant between Gans and O. P. Randall. A tenant must respect his landlord's title. He cannot attorn to a person who is not in privity with such title, and if he attempts to do so it has no validity as against the landlord or his representative or grantee: Wood, Landl. & Ten. § 541, p. 929; 1 Taylor, Landl. & Ten. (8 ed.) § 180. Indeed, Mr. Justice CAMPBELL thinks that an agreement by a lessee to pay rent to a third

person who has no title is invalid for want of a consideration. He says, in *Fuller v. Sweet*, 30 Mich. 237 (18 Am. Rep. 122): "Where a person in possession agrees by parol to pay money to a person out of possession, and who has no title, it is impossible to find any sensible ground for sustaining such a promise which would not sustain any other promise made without consideration. Where there is an indenture, there is, at common law, a presumed consideration. Where there is possession given, there is an actual consideration, which may render it also reasonable enough, under ordinary circumstances, to require the landlord to be put back in *statu quo*. But a person who never had or gave up possession to the tenant is left in *statu quo* by the tenant's remaining in possession, and in reason should have no further claim. If he has, it must be by some peculiar and anomalous rule, for which we have found no support." If, however, it be conceded that one in possession of land under a lease may attorn to a third person, it would seem that the only effect would be to estop him from denying the title either of his landlord or such third person: *Hamilton v. Pittock*, 158 Pa. 457 (27 Atl. 1079); *Carter v. Marshall*, 72 Ill. 609; *Lyon v. Washburn*, 3 Colo. 201. Whatever, therefore, the legal relationship of Gans and T. J. Randall may have been at the time of the defendant's purchase, Gans was, notwithstanding, the tenant of O. P. Randall, to the extent that the defendant was chargeable by his possession with knowledge of the plaintiff's equities in the property, as an inquiry of Gans would have naturally disclosed the true state of affairs.

3. It is argued that in cases of this character the court acts upon conscience, and that it is only upon the ground of *mala fides* that a purchaser for value is affected with the notice of a prior claim. Such is undoubtedly the rule where it is sought to charge him with notice on account of rumors or reports concerning the title: *Raymond v. Flavel*, 27 Or.

219 (40 Pac. 158); *Bowman v. Metzger*, 27 Or. 23 (39 Pac. 3, 44 Pac. 1090); *Crossen v. Oliver*, 37 Or. 514 (61 Pac. 885). But where the property at the time of the purchase is in possession of a stranger, the physical facts are such as to put the purchaser upon inquiry, and, if he fail to make such inquiry, he is in law chargeable with bad faith, and cannot claim the rights of a *bona fide* purchaser.

4. Again, it is said that if the defendant had acted upon the notice imputed by Gans' possession, and made inquiry of him concerning the title, he would not have been able to ascertain the true state of facts, as Gans did not know of the unrecorded deed. An inquiry, if made, would have disclosed the fact that Gans was and had been for many years holding possession of the property as the tenant of O. P. Randall, and that would have been notice of some claim or right in his landlord, the nature and character of which the defendant was in duty bound to endeavor to ascertain. However, he made no inquiry, and he is therefore chargeable with knowledge of the actual condition of the title. If he had exercised due diligence in attempting to ascertain the outstanding title, and had been unable to do so, a different question would have been presented; but as he made no attempt of the kind, he is not in a position to urge that such inquiry would probably have been unavailing.

5. And, finally, it is argued that the possession of Gans was not notice to the defendant of the title of O. P. Randall, because of the rule announced in *Exon v. Dancke*, 24 Or. 110 (32 Pac. 1045), that the continued possession of land by the grantor is not notice to a *bona fide* purchaser from the grantee of any claim to the property by the grantor. There is authority for holding that this rule does not apply where a grantor remains in continuous possession long after the recording of the deed: *Bennett v. Robinson*, 27 Mich. 26; *Stevens v. Hulin*, 53 Mich. 93 (18 N. W. 569).

But whatever the rule may be upon that point, the doctrine can have no application here, because the grantor himself did not remain in possession of the property. Gans' possession was sufficient to put the defendant upon inquiry as to the rights under which he was holding, and as such inquiry, if prosecuted, would presumably have disclosed his landlord's title, the defendant is chargeable with notice thereof.

We are of the opinion, therefore, that the plaintiffs are entitled to the relief demanded, and the decree of the court below must be affirmed.

AFFIRMED.

Argued 1 July, decided 27 July, 1903.

WAGNER v. DORRIS.

[73 Pac. 318.]

MINES — EVIDENCE OF LOCATION OF CLAIM.

1. The evidence sustains the finding of the trial court that assessment work done by defendants on a previous claim embracing the land contained in plaintiff's location was not within the limits of such prior claim, and that the same was therefore subject to relocation.

MINES — EVIDENCE OF VALUE OF ASSESSMENT WORK.

2. The evidence sustains the finding of the trial court that the assessment work in dispute was not of greater value than fifty dollars.

From Lane: JAMES W. HAMILTON, Judge.

This is a suit by Charles Wagner against Geo. A. Dorris and others to quiet title to a mining claim known as the "Democrat," situated in the Blue River Mining District, in Lane County. He avers that he located the claim January 1, 1901, and that the defendants claim some right, title, or interest therein adverse to his, and prays that they be required to set up the nature thereof, that it may be adjudicated. Defendants answer that on July 30, 1898, Louis Wagner located a claim known as the "Wagner Mining Claim," commencing at the northwest end of the Republican Claim, at Franks Creek, and about 100 feet southwest of a waterfall, running 1,500 feet in a northwesterly direc-

tion to the southeast end of the Uncle Sam Mining Claim; that said Wagner claim was located over and upon a part of what was formerly known as the "Defenca Claim," except a strip of about 40 feet in width off the south end thereof; that one Frank Mengoz claimed some interest in the 40 feet not covered by the Wagner; that on March 23, 1900, Louis Wagner, Frank Mengoz, and defendants Pepiot and Dorris mutually agreed that the southern line of the Wagner be moved south to conform to the south end line of the Defenca; that thereupon, and for a valuable consideration, Wagner deeded to Pepiot and Dorris an undivided one half interest in the Wagner claim, and to the defendant Fisher an undivided eighth interest therein; that by virtue of such deeds Louis Wagner and the defendants Fisher, Pepiot, and Dorris became joint owners thereof; that, during the year 1900, Fisher, Pepiot, and Dorris performed assessment work on said claim, of the reasonable value of \$100; that Wagner failed to perform any work thereon; and that by reason thereof defendants Fisher, Pepiot, and Dorris are now the owners of said Wagner claim, and were such owners when plaintiff pretended to locate the Democrat. These allegations are denied by the reply, and thus are presented the issues for trial.

The circuit court made findings of fact that plaintiff duly located the Democrat Mining Claim; that said claim conflicts with and substantially covers the same ground as the Wagner; that said defendants did not, nor did either of them, perform work or labor on the Wagner for the year 1900, or place improvements thereon during said year, of greater value or reasonable worth than \$50; that by reason thereof the Wagner claim became forfeited and subject to plaintiff's location. A decree was thereupon rendered in favor of plaintiff, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Geo. A. Dorris* and *Lawrence T. Harris*, with an oral argument by *Mr. Harris*.

For respondent there was a brief over the name of *Pipes & Tift*, with an oral argument by *Mr. Martin L. Pipes*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The real question involved is whether defendants performed the proper or a sufficient amount of assessment work upon the Wagner Mining Claim for the year 1900 to prevent a forfeiture; but, incidentally, there is a dispute relative to the true southeasterly boundary line of the Wagner claim, the defendants insisting that it is south of the mouth of a tunnel formerly excavated in the vicinity, while the plaintiff asserts that it lies to the north thereof. Whatever assessment work was done by defendants was within these disputed boundaries, so that, unless they are right in their contention, the work done was not within the limits of the Wagner claim. But, if within the limits thereof, the question remains whether there was sufficient work done and improvements made for the year 1900 to conform to the requirements of the law authorizing such location.

To be understood, it should be premised that the claim in dispute lies at an angle with a true north and south line of from ten to twenty degrees, and is described as running in a northwesterly and southeasterly direction, and the end lines are referred to, interchangeably, as the north (or northerly) and south (or southerly), or the northwesterly and southeasterly, end lines.

Frank Mengoz and R. Pepiot located the Defenca, July 1, 1888, and the tunnel spoken of was probably constructed on this claim. Louis Wagner, a brother of the plaintiff, located the Wagner on July 30, 1898. These two claims

cover much the same ground, except the Wagner does not extend so far north as the Defenca. In the month of March prior to the location of the Wagner, Frank Mengoz located the Republican Mining Claim, which conforms in its northwesterly boundary line with the southeasterly boundary line of the Wagner, the lines being practically identical as separating one claim from the other. Some litigation arose involving a dispute as to the relative boundaries of the Wagner and Defenca, and a settlement was effected March 23, 1900, between the parties litigant, wherein Louis Wagner deeded to defendants Joe Pepiot and George A. Dorris an undivided half interest in the Wagner, and thereafter Fisher acquired some interest therein. At the same time, Frank Mengoz quitclaimed to Louis Wagner all his interest in the Defenca. Subsequently, Mengoz conveyed an undivided one half interest in the Republican to Louis Wagner. On the 1st of January, 1901, the plaintiff, Charles Wagner, located the Democrat Mining Claim, embracing substantially the same ground as the Wagner, upon the assumption that it was unappropriated public land of the general government, and subject to location. These facts are practically undisputed.

1. Frank Mengoz testifies that in locating the Republican he put the north center end stake upon the hill, 60 feet northwest of the mouth of the tunnel, and 360 feet from the discovery point; that it consisted of a piece of timber and that he nailed a board on an old snag there, and "wrote what it was"; that the mouth of the tunnel was wholly within his claim; that he knows the location of the southeast center end stake of the Wagner, and that it is right at the northwest center end stake of the Republican, his board on one side and the Wagner notice on the other; that he saw it about a week after it was put there, and has seen it many times since; and that the work done

by Pepiot and Dorris in 1900 was on the Republican claim. Louis Wagner testifies that he put a stake at the dump near the mouth of the tunnel about two weeks after he located the Wagner; that he commenced work in the tunnel, and put the stake there to divide his quartz rock from that of Mengoz (it should be understood that the tunnel is about 240 feet in length, and extends in any event some distance into the Wagner claim); that he indicated, by writing on the stake, that the southeast end stake of his claim (the Wagner) was about 60 feet above; that a copy of the notice of location was contained in a can at the stake; that he located the Wagner, and put the south center end stake by the side of the north center end stake of the Republican; that he nailed some boards on the opposite side of the snag to the north, wired a can to the stake, and left the location notice in it; that he made no claim to the mouth of the tunnel; and that he never afterward changed the south center end stake of the Wagner. Such is the positive testimony of the two men who located these adjoining claims. They are strongly corroborated as to the center end stake dividing the Wagner from the Republican by James Hennessy, George Lea, James Neil, Elmer Neil, and Frank Pepiot. Beyond this is the testimony of Charles Wagner that in locating the Democrat he placed his south center end stake beside the end stake of the Wagner and Republican, which he saw and recognized as such, and that the southwest (southeast) end line of the Democrat was the same as the northwest end line of the Republican. The defendants, however, insist that the stake at the dump, which Louis Wagner testifies he put there to indicate a separation of his quartz rock from that of Mengoz, is the true center end stake between the Wagner and the Republican claims, and that the work done in 1900 was to the north thereof. Mr. Dorris testifies that he, with others, went over the ground in February or March, 1900, for the

purpose of observing the conditions relative to the location of the Wagner claim; that they found a stake at the dump, and by it the can, containing a copy of the location notice of the Wagner; that on the stake was printed, whether on paper or board the witness had forgotten, this language: "Notice. Southwest (southeast) end of the Wagner Mining Claim, running 1,500 feet in a northwest direction to the southeast end of the Uncle Sam. July 30, 1898. L. Wagner, locator. Notice in can"; that he observed nothing to indicate that the true stake was situated 60 feet above, as testified to by Louis Wagner and Frank Mengoz; that he took an exact copy of what was written, and was able to testify positively concerning it. In this testimony he was corroborated in the main by some of the men who were with him. Some of these men saw the stake on the hill, but the consensus of their evidence is that it was there simply to mark the center line of the ledge upon which the claim was located, and was not intended to indicate in any manner the southeasterly boundary of the claim. James Kennerly, a witness for the defendants, testifies that the tunnel is all on the old Defenca claim; that the stake in the dump was marked, "but didn't say the south end stake; it was the center end stake of the Wagner"; that he was present on the morning of the 23d, when the settlement of the litigation was effected; that it was understood that the line of the Wagner should be set back to the old Defenca line, which was then considered to be some 80 or 90 feet from the mouth of the tunnel; that the Wagner south center end stake was still farther down the hill, below the dump, but it lacked a few feet of going down to the old Defenca line; that there were only five or six feet between the lines of the Defenca and the Wagner; that Mengoz did not want to give up the cabin, but that it was agreed that he should have the use of it the same as if he

owned it, and that Pepiot and Dorris were the owners of the land.

This cursory allusion to the testimony shows some of its more marked features, and indicates wherein the divergency lies as between the parties. The details bear reference to the location of Franks Creek and one or more waterfalls therein, the direction of the disputed center end post therefrom, the same being situated, as described in the notice of location, about 100 feet southwest of the first waterfall in said creek, and to the location of cabins and other improvements in the vicinity. The stake in the dump appears to be in a southwesterly direction from a waterfall, and the witnesses estimate it as from 40 to 100 feet therefrom, but it is concededly not upon any ledge. The stake on the hill is in a northeasterly direction from this particular fall, and leads to some confusion; but the situation of the dump stake with reference to the particular fall described by the witnesses is not a circumstance of conclusive effect. The stream has been changing its course somewhat, and there is more than one waterfall in proximity to the *locus in quo*; nor is the testimony as to the cabins and other improvements of much avail in determining the true line. The features in the testimony of controlling importance, to our minds, are the location of the Republican by Mengoz, the location of the Wagner by Louis Wagner, and the identification by them, and other witnesses of repute, of the stake on the hill above the tunnel as being the northwest center end stake of the Republican and the southeast center end stake of the Wagner. The testimony of defendants, it must be conceded, tends strongly to the disparagement of this view, but its effect is not sufficient to overcome it. Mengoz was instrumental in the location of the old Defenca, and knew that the mouth of the tunnel was located thereon, and, in making a relocation, the Defenca in all probability being

at the time subject to such action, it was very natural that he should extend the lines of the Republican farther to the north, so as to include a portion of the tunnel; and then Louis Wagner, with whom Mengoz had assuredly conferred in reference to the claim, shortly afterward located the Wagner, and, corroborated as they are by the testimony of Charles Wagner as to the identity of the true end stake dividing the Wagner from the Republican, and by the other witnesses named above, we are induced to believe that the stake on the hill, and not the one in the dump at the mouth of the tunnel, designates the true southeasterly boundary of the Wagner. The settlement alluded to as having been entered into between the parties litigant March 23, 1900, relative to setting the southeasterly line of the Wagner back to conform to the corresponding end line of the Defenca, could not affect the plaintiff herein, as he was not a party thereto. It is apparent, therefore, that the work done by Fisher, Pepoit, and Dorris was not on the Wagner claim, and such claim was therefore subject to relocation.

2. But if there be any doubt about the correctness of this conclusion, the case is disposed of by the fact that the assessment work which the defendants performed was not of the reasonable value of \$100. The trial court found it to be of no greater worth than \$50, and we think the deduction is a fair one from the testimony. Rucker and Mitchell did the work, and one of them makes an affidavit that it was worth at least \$100. Both were placed on the witness stand, and testified that they believed, or were of the impression, that they worked fifteen or sixteen days each, but kept no memorandum of the time. On cross-examination, they could not give the day when they commenced or when they quit work, and were vacillating, indefinite, and uncertain as to the number of days engaged in the service, and would not say that they had even worked fifteen days

each. The testimony of Louis Wagner is positive on the subject that they worked but nine days each, and this had partial corroboration by Mengoz and other witnesses, which could not by any reasonable wage scale bring the value of the work up to \$100. Fisher testifies that he paid these men \$108.50, and we have no reason to doubt what he says; but he could not say what amount of work they did, and he was assuredly imposed upon by them. The requisite amount of work was evidently not performed.

In any view of the case, therefore, the Wagner was subject to relocation on January 1, 1901, and, there being no dispute but that the plaintiff's location of the Democrat was otherwise regular, the decree of the trial court should be affirmed, and it is so ordered.

AFFIRMED.

Decided 27 July, rehearing denied 5 October, 1903.

BEAVER LUMBER CO. v. ECCLES.

[73 Pac. 201.]

INJUNCTION AGAINST WASTE BY MORTGAGOR IN POSSESSION.

1. A mortgagee of land may maintain a suit to restrain waste by the mortgagor that will impair the value of the property as security for the debt. For example, in this instance defendant mortgaged 1,800 acres of timber land, and the timber on 400 acres more, the principal value of the security being the growing trees. The defendant installed a valuable logging and sawing plant to manufacture the standing timber into lumber, and was operating it when this suit for an injunction was filed. *Held*, that the trial court properly restrained further operations by defendant, though it would take ten years to remove all the timber, and the mortgage was entirely due in two years, for the removal of a fifth of the property pledged would be a material reduction of the security not contemplated by the contract.

IMPAIRMENT OF MORTGAGE SECURITY — FACTS IN EVIDENCE.

2. Timber land valued at \$47,500 is not disproportionate security for a mortgage of \$30,000 subordinate to a previous lien of \$5,000, in view of the known fluctuations in timber and lumber.

WASTE BY MORTGAGOR — BOND OF INDEMNITY.

3. In a case where a mortgagor should be enjoined from continuing waste on the mortgaged property, defendant ought not to be permitted to continue his destruction upon filing a satisfactory bond, either for the payment of the debt when due, or to indemnify plaintiff for such damages as he may suffer by the diminution of the security.

From Columbia: THOS. A. McBRIDE, Judge.

This is an appeal by William Eccles and others from a decree of the circuit court enjoining them, at the instance of the Beaver Flume & Lumber Co., from cutting and removing certain timber, until a mortgage to secure the payment of \$30,000, one half payable in one year and the remainder in two years from the date thereof, given by defendant Eccles to plaintiff April 8, 1902, is fully paid. The mortgage covers 1,800 acres of timbered land, and also the timber upon about 400 acres additional, together with certain fluming privileges and rights of way, and is subject to a mortgage to the board of school land commissioners to secure a loan of \$5,000. The chief or principal value of the land thus incumbered consists in the standing timber thereon, denuded of which the land itself would be practically worthless. Subsequent to the execution of the mortgage, the defendant Eccles placed valuable improvements upon the land, at a large expense to himself, for the purpose of cutting and manufacturing the timber into lumber, shingles, and piling, and was actively engaged in the business when this suit was begun and a temporary injunction granted. The value of the timber is variously estimated, ranging from \$25,000 to \$100,000. The defendants make no denial of their purpose to continue cutting and removing the timber, but say that it would take ten years to remove the whole thereof, and that not more than one tenth of it will be taken by them prior to the maturity of the debt, and that plaintiff's security will not be materially impaired thereby; and, further, the defendant Eccles proffers to give to the plaintiff such a bond as the court may require and approve, conditioned that he will pay all such indebtedness at maturity, or that he will pay to plaintiff any damages that it may suffer by reason of removing any such timber, and thereby reducing the value of its security.

AFFIRMED.

For appellants there was a brief over the name of *Coover & Stapleton*, with an oral argument by *Mr. Geo. W. Stapleton*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. G. C. Fulton*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

The questions involved are (1) whether plaintiff has shown a right to the relief sought, and, if so, (2) whether the defendants are entitled to stay the injunction by executing the proffered bond.

1. Ordinarily, a mortgagee has the right to restrain the commission of waste, where it tends to the impairment of his security. An action at law for trespass, if one lies, is not a certain nor always an adequate remedy in such cases, and it is therefore, as a general rule, unnecessary to allege insolvency of the mortgagor, or that the injury threatened is literally irreparable: 1 Jones, Mort. (2 ed.) § 684; 1 High, Injunc. (2 ed.) § 693; *Vanderslice v. Knapp*, 20 Kan. 647. Such acts as will render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency, constitute, according to the consensus of authority, an impairment of the security, through the commission of waste. Such is the conclusion reached by Mr. Justice DICKINSON in *Moriarty v. Ashworth*, 43 Minn. 1 (44 N. W. 531, 19 Am. St. Rep. 203), citing many text-writers and adjudicated cases. Among them, see references above, and *King v. Smith*, 2 Hare, 239, 244; *Coker v. Whitlock*, 54 Ala. 180; *Buckout v. Swift*, 27 Cal. 433 (87 Am. Dec. 90); *Harris v. Bannon*, 78 Ky. 568. See, also, *State v. Northern Cent. Ry. Co.* 18 Md. 193. But, in the application of the rule, he says: "We think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful

sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that, if the debt is not yet mature, it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become depreciated from causes not now known." The rule is applicable where realty is mortgaged in the usual way, and constitutes the embodiment of the security. The mortgagor may do many things as the owner of such an estate, and use it in the ordinary way, without in any wise affecting the mortgage contract, and, unless the waste goes to the impairment of the estate itself to such an extent as to render the security of doubtful sufficiency, regarded in the light of business principles, there can be no restraint. The present, however, is not the usual case. The growing timber, and not the realty as such, except as the timber may be regarded as realty, is the very substance of the security, and was so considered from the inception of the contractual relations. Its severance and removal, therefore, is as much a taking of the substance as if lumber had been mortgaged and it was sought to dispose of a portion of it contrary to the conditions of the hypothecation. While the cutting of firewood and the severance of other parts of realty, in its usual acceptation, as are incident to the use, occupation, and improvement of land, in the ordinary manner and for the purposes for which it is ordinarily used, are not accounted an invasion of the mortgagee's right or estate (2 Tiffany, Mod. Law Real Prop. § 524),

yet it seems almost self-evident that a direct withdrawal or dislodgment of one tenth of the very property hypothecated would amount to a material and vital deterioration of the security contracted for, and, not only this, but would be a direct impairment of the contract itself, and it would be inequitable and unjust to permit it.

2. The question as to whether it would render the security of doubtful sufficiency is hardly in the case. But, if it were, the facts are such as would warrant the injunction at any rate. Eccles bought the property for \$47,500, paid \$12,500 down, and it is incumbered for the balance, the plaintiff's mortgage being subordinate to one to the board of school land commissioners for \$5,000; so that, in business estimation, the value of the security may not be considered disproportionate to the amount of the mortgage. True, the mortgagor has placed large improvements thereon, and it is probable that timber has advanced in value. But without the timber the improvements would be of little value; besides, the price of timber is fluctuating in the market, and it cannot be said with certainty that its value will even be as great when the debt becomes due as it was when the mortgage was executed; hence the contention of appellants is without merit, and the injunction was therefore, in our opinion, properly granted.

3. Should the defendant Eccles be allowed to execute a bond for the payment of the debt, or for such damages as the plaintiff may suffer by reason of the removal of the timber, and thereby avoid the injunction process? If permitted to do so, it would, it must be conceded, amount to the virtual substitution of one security for another, and that, not only without the consent, but against the protest, of the mortgagee. The conditions must certainly be unusual that would warrant a court of equity in adopting such a procedure. A case is cited where the security consisted of pine woodland which had been burned over,

and it became necessary to cut the wood off in order to preserve it and to permit a new growth to take its place, and the court allowed the cutting to proceed upon the defendant's furnishing security equal to the value of the wood, to be fixed by a referee: *Brick v. Getsinger*, 5 N. J. Eq. 391. Other cases are cited where, pending a dispute as to the title or right to the possession of realty, courts have permitted security to be given to cover any damages sustained by the removal of the timber in the meanwhile, where extensive preparations had been made for the purpose, and a present delay would result in great loss to the investors: *Wood v. Braxton* (C. C.) 54 Fed. 1005; *Roper Lum. Co. v. Wallace*, 93 N. C. 22; *Commissioners of Burke County v. Catawba Lum. Co.* 114 N. C. 505 (19 S. E. 636). The applicability of these cases is not apparent here. Whatever outlay the defendant Eccles made was for the purpose of invading the very substance of the estate or property which he expressly pledged as security for the payment of his debt. Now, the mere fact that the expenditure was incurred, and men employed to remove the timber and manufacture it into lumber and other commodities to be disposed of in the market, can afford no sufficient reason why a court of equity should interpose to change the basis of the security in order to permit the further prosecution of the enterprise. The enterprise was inaugurated in subordination to the contractual rights of the plaintiff, and, unless some peculiar change in the conditions over which the parties had no control should require special interference to protect them, or either of them, from loss or damage, there can be no interposition to relieve against a contract legally made and fairly entered into. The decree of the circuit court should be affirmed, and such will be the order of this court.

AFFIRMED.

Decided 27 July, rehearing denied 5 October, 1908.

WAITE v. GRUBBE.

[63 Pac. 206.]

GIFT—EVIDENCE OF INTENTION OF DONOR.

1. Declarations by a father to his daughter, "I give this money to you. It is yours," etc., show unmistakably a present intent to give the money to the daughter; and the fact that in the same connection he also said, "If I should get well, and want some of it, would you let me have it?" and she replied, "Yes, papa, if you get well, you can have all of it," only emphasizes the purpose to give presently.

GIFT—EVIDENCE OF DELIVERY BY FATHER TO CHILD.

2. Decedent having buried sums of money in various places about his estate, took his daughter to the whereabouts of the money during his last illness, and while quite feeble, and told her definitely the several places where it was concealed, with a positive declaration that he gave it to her, cautioning her not to let any one else know where it was, and advising her to leave it there until the place was rented or she needed it. *Held*, a sufficient delivery.

GIFT—CLAIM AGAINST DECEDENT'S ESTATE.

3. A claim to certain property as a gift cannot be regarded as a claim against the estate of the donor, within the meaning of Section 1161, B. & C. Comp., requiring other evidence than that of the claimant to establish it.

From Douglas: JAMES W. HAMILTON. Judge.

This is an action by F. B. Waite, as executor of the estate of Fendal Sutherlin, deceased, against Kate Grubbe and her husband to recover possession of \$7,885 in gold coin, alleged to be the property of the estate of Fendal Sutherlin, deceased. The defendant Kate Grubbe claims to be the owner of the money, and to have acquired it by gift from the deceased. At the trial, all the evidence having been submitted, the circuit court, upon motion of the plaintiff, directed the jury to return a verdict in his behalf for the entire sum, and, judgment having been rendered accordingly, the defendants appeal. REVERSED.

For appellant there was a brief over the names of *Geo. M. Brown, J. C. Fullerton, and Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Fullerton* and *Mr. Rufus Mallory*.

For respondent there was a brief and an oral argument by *Mr. F. W. Benson* and *Mr. Oliver P. Coshow*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

Fendal Sutherlin died testate August 29, 1901, leaving an estate of the probable value of \$200,000. The defendants are his daughter and her husband. Mrs. Grubbe testified, in substance, that she was with her father one week in May, during his last illness, and from the last of June or first of July to the day of his death, and attended upon him constantly; that he told her several times he intended to give her some money, as he had not done as much for her as for the other girls—had never sent her to school, or educated her, or given her any money; that late one night he observed that there was a swelling in his legs, and became apprehensive that it was going to his heart, and said to her: "I have \$10,000 buried on this place, and I want to give it to you. I am going to give it to you, and in the morning I will show you where it is buried;" and she continued in language following: "So in the morning he said for me to get a little bucket, and go to the garden, 'and I will come to the garden. I can take a little bucket along, and get some beans, and the rest will not suspicion what we are going for.' So I got a bucket and we went to the garden, and I saw that he could not walk very far, so as we passed the smokehouse there was a box there, so I picked up the box and carried it along for him to sit on, and when we got a little ways he began to fall. So I got hold of him, and placed him on the box, and he sat there, and he pointed the place out to me, and he said: 'I give this money to you. It is yours. But if I should get well, and want some of it, would you let me have it?' And I said: 'Yes, papa; if you get well you can have all of it. I will give it back to you if you get well.' He went then and pointed out the places there. He said, 'You know that old chicken house down there in the hog lot,' and I said 'Yes,' and he said, 'I buried about \$2,000 there.' He said: 'I dug

up \$1,000. I had the boys scrape the dirt away from the top of it, and haul it on the garden. They thought I was putting it on the garden, but I was having them take it away so I could get the money. Now,' he said, 'in the old chicken house across the creek, I buried \$2,000 there. In some places there may be more, and in some places there may be less; but the next place, now,' he said, 'is the smoke-house. I buried \$2,000 there, but I have strong suspicions some one found part of it.' Then he said: 'The next place is the water-closet. I buried \$2,000 in there.' And he said: 'You know the garden, there. You see that Red June tree in the corner of the garden?' And I said 'Yes.' And he said: 'The second post this side of that tree is a tile ditch goes through there, and out this way there is a tile ditch goes through there;' and he says, 'I buried \$2,000 there; \$1,000 on each side of the ditch.' * * He said it was mine; he gave it to me; he wanted me to have it. * * He talked with me about it several times during his sickness. The next time, I think, that he mentioned it, was when Mr. Waite and his wife came back over there, and he said not to tell any one about this money." The witness further testified that her father told her to leave the money where it was unless he should rent the place, in which event she should get what was in immediate danger of being found, but he said to leave the other where it was for safe keeping and get it as she needed it; and that she left the money there on the premises on the advice of her father. Benton Myers testified that Sutherlin some time in July, about six weeks prior to his death, told him that Kate, who was present at the time, was a noble woman; that he had not provided for her as well as he had for the other girls, and that he intended to pay her for staying with him—to give her something before he died; that he was so bad off after that he did not talk about the matter, but that at one time prior he said he expected to make Kate a

present of enough money before he died to make her even with the other girls. It was further shown that about the time of the transaction Sutherlin was very feeble, and was soon confined to his bed, from which he was never able to arise. Mrs. Grubbe did not possess herself of the money, or any part of it until some nine or ten months after the death of her father, when she and her husband and son found money at every locality pointed out to her as a place of concealment. This evidence was practically undisputed, and the question arises, was it sufficient to carry the case to the jury? And that depends upon its sufficiency to support a gift.

1. The gift, if consummated, was manifestly made in the apprehension of death from an impending mortal affliction. Two things are essential to a valid gift—the intent on the part of the donor to bestow the thing to be given upon the donee or object of his bounty, and a delivery, coupled with an acceptance on the part of the donee, express or implied. From the testimony of Mrs. Grubbe there can be no cavil touching the intent of her father to give her the money secreted at the different places disclosed and pointed out to her. His declarations were positive, signifying unmistakably a present gift or bestowal of the money upon her. His words were, “I give this money to you; it is yours,” and other expressions of like import, indicating a purpose to bestow the money presently and unconditionally. True, he said to her in the same connection, while pointing out the places of deposit, “If I should get well, and want some of it, would you let me have it?” and she replied, “Yes, papa; if you get well you can have all of it. I will give it back to you if you get well.” But this only emphasizes the purpose to give presently and effectually, as he made himself dependant upon her favor to let him have some money if he should get well, and be in need of it. He was manifestly labor-

ing under the solemn conviction that he would never recover from his impending malady, and that he was making an absolute and final disposition of the money, and that in all human probability he would never be in want of any of it.

2. The intention to give being manifest (and this is tacitly conceded), the real controversy is whether there was a delivery of the money by the father to the daughter sufficient to meet the requirements of the law, and thereby to make the gift effectual. We held in *Liebe v. Battmann*, 33 Or. 241 (54 Pac. 179, 72 Am. St. Rep. 705), that, to constitute a delivery, "there must be a parting with the dominion over the subject-matter of the pretended gift, with a present design that the title shall pass out of the donor and to the donee, and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he becomes a trespasser, for which he incurs a liability over to the donee, except after revocation of a gift *causa mortis*." From the viewpoint of the donee, the principle is stated by HARPER, Ch., in *Blake v. Jones*, Bailey, Eq. 141 (21 Am. Dec. 530, 534), as follows: "That seems to be regarded as a sufficient delivery which would authorize the donee to take possession without committing a trespass."

It is not necessary that there be a manual delivery, or an actual tradition from hand to hand. The delivery may be constructive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit: 14 Am. & Eng. Ency. Law (2 ed.), 1058; *Hillebrant v. Brewer and Wife*, 6 Tex. 45 (55 Am. Dec. 757). Says HARKER, P. J., in *People v. Benson*, 99 Ill. App. 325, 327: "An unequivocal declaration of gift, accompanied by a delivery of the only means by which possession of the article given can be obtained, is sufficient." The subject

of the gift in that case consisted of some notes that at the time were locked up in a safe in a shop where the donor had transacted business before being stricken with his last illness. Coupled with the situation of the notes was the declaration that he had given them to his wife in lieu of a certain policy of life insurance, and it was held sufficient to support the gift. In the language of Mr. Justice RUGGLES: "The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it": *Harris v. Clark*, 3 N. Y. 93, 113 (51 Am. Dec. 352). Or, as was said by Mr. Justice LEONARD, with more elaboration: "It is essential to a valid gift by parol that there should be an actual or symbolical delivery. The title does not pass unless possession, or the means of obtaining it, are conferred by the donor and accepted by the donee. The situation, relation, and circumstances of the parties and of the subject of the gift may be taken into consideration in determining the intent to give and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary": *Cooper v. Burr*, 45 Barb. 9. In that case the donor, who was confined to her bed, delivered the keys of a bureau and some trunks kept in her room, with an unequivocal declaration that she gave to the donee all her property, and it was held to constitute a completed gift of the gold and silver coins and jewelry contained in the bureau and trunks. These principles and declarations of the law touching the manner of delivery essential to a completed and effectual gift have been many times applied: *Goulding v. Horbury*, 85 Me. 227 (27 Atl. 127, 35 Am. St. Rep. 357); *Devol v. Dye*, 123 Ind. 321 (24 N. E. 246, 7 L. R. A. 439); *Thomas, Adm'r v. Lewis*, 89 Va. 1 (15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848); *Grover v. Grover*, 24 Pick. 261 (35 Am. Dec. 319); *Coleman v. Parker*, 114 Mass. 30; *Hagemann v. Hagemann*, 90 Ill. App. 251; *Stephenson's*

Administrator v. King, 81 Ky. 425 (50 Am. St. Rep. 173); *Gammon Theolog. Sem. v. Robbins*, 128 Ind. 85 (27 N. E. 341, 12 L. R. A. 506); *Fletcher v. Fletcher*, 55 Vt. 325; *Ross v. Draper*, 55 Vt. 404 (45 Am. Rep. 624). Where the intent to bestow is obvious and clear, and the language and deportment of the donor indicate a belief upon his part that he has done all that is necessary to accomplish his purpose, they come to the aid of the act of delivery, if slight and ambiguous, but not to dispense with it as an essential element of a valid gift: Thornton, Gifts, § 148. And a delivery by a father to a child in pursuance of an intended gift may be established by less positive and unequivocal proof than is required where the fact is at issue between strangers: *Schwindt v. Schwindt*, 61 Kan. 377 (59 Pac. 647); *Love v. Francis*, 63 Mich. 181 (29 N. W. 843, 6 Am. St. Rep. 290).

Aided by these authorities and the principles and rules of law which they announce, we will determine whether the fact of delivery may be reasonably deduced from the facts in evidence. There was not a manual delivery or an actual transfer of the money from the hand of the father to the hand of the daughter. If there was a delivery at all, it was constructive. The manual possession was not in the father at the time, although he had it constructively, the money being deposited upon the premises then in his possession and under his control. The places of deposit were known to him only, and the secret was his protection from plunder. Being barely able to walk to the garden, a place apart from all other persons, he there imparted to his daughter the information as to the whereabouts of the money by pointing out to her definitely and particularly the several localities in which it was concealed, with a positive and unequivocal declaration that he gave it to her, and that it was hers, cautioning her not to let any one else know where it was, and advising her at the

same time to leave it there until the place was rented, or until she needed it. The delivery was as complete as the circumstances of the case would permit. He was physically unable to disinter the coins, and it was not advisable for the daughter to attempt to do so, as it might have led to a discovery of the deposits by others, and this he evidently deemed unnecessary for a full accomplishment of his undoubted purpose of bestowing the money upon his daughter. The taking of the money subsequently by her would not have been attended with the commission of a trespass, and the gift would assuredly have been complete if she had taken manual possession thereof during his lifetime. Was the delay in this respect a fatal oversight on her part? She accepted the money when he made his declarations of the gift to her, and it was so understood between them. It seems to us, therefore, that the delivery was as perfect and complete as the nature of the property, the situation of the parties, and the circumstances of the case would permit. By imparting to the daughter the information as to the location of the deposits by specifically pointing them out to her, he, in effect, gave her the key to his safety vault—employing the very apt figure of speech of one of the counsel for appellants—whereby she was enabled to unlock it, and take the deposits therefrom. The vault was not in his immediate presence, nor could he safely, or by reason of his physical infirmity, go to it, so that he could reach in and take the money and hand it to her, nor was it convenient or prudent for her to take it from out the vault at once, or prior to his decease, so that it remained there without molestation until removed as shown by the testimony, each of the parties believing without doubt that the gift was a thing fully accomplished. This, to our minds, was a good delivery, constructive though it was, and the property in the money passed to the daughter at the time, and henceforth it was her right

to take it, and do as she liked with it. The case should, therefore, have gone to the jury for them to determine as to the credibility and weight of the testimony adduced by the parties to establish their respective contentions. The case of *Liebe v. Battmann*, 33 Or. 241 (72 Am. St. Rep. 705, 54 Pac. 179), in no wise conflicts with these views.

3. Nor can the defendants' claim of ownership of the money be regarded as a claim against an estate of a deceased person, within the meaning of Section 1161 B. & C. Comp., requiring satisfactory evidence other than the testimony of the claimant to establish it. Reversed, and remanded for such other proceedings as may seem proper, not inconsistent with this opinion. **REVERSED.**

Decided 27 July, rehearing denied 7 December, 1903.

FERGUSON v. KABOTH.

[73 Pac. 200, 74 Pac. 466.]

PRIORITY BETWEEN MORTGAGE AND TAX LIENS.

1. While Section 2821, Hill's Ann. Laws, was in force, the lien of a mortgage, and the right of a purchaser under it, was superior to all rights acquired under a tax assessed and levied on the property subsequent to the execution of the mortgage.

CONSTRUCTION OF STATUTE—LIABILITY OF GRANTEE FOR TAXES.

2. Section 2846 of Hill's Ann. Laws, providing that as between the grantor and grantee of land, when there is no express agreement as to which shall pay taxes assessed before the conveyance, if the land is conveyed at the time of or prior to the date of the warrant authorizing the collection of such taxes the grantee shall pay the same, and if conveyed after that date the grantor shall pay them, does not impose a duty on the grantee of land to pay taxes assessed thereon at the time of his purchase but not yet payable. It was designed to give the grantor of land conveyed between the time of the assessment of taxes and the date of the warrant for their collection a right to recover from his grantee the amount of such taxes, if the former was obliged to pay them, in the absence of an express agreement.

EFFECT OF ACT CURING DEFECTIVE TAX PROCEEDINGS.*

3. Section 5 of the act of 1901, relating to the purchase and sale by county judges and school clerks of land sold for taxes (B. & C. Comp. § 3135), does not make valid void tax proceedings, for no legislature can validate a void proceeding, though it may retrospectively cure irregularities or imperfections not vital. For example, where a sale for unpaid taxes is entirely void and of no effect, a subsequent act purporting to declare a deed by the purchaser at such sale conclusive

* NOTE.—See authorities collected in note in 4 Am. St. Rep. 187-189, Power of Legislature to Make Tax Deeds *Prima Facie* or Conclusive Evidence; in note in 36 Am. St. Rep. 686, Validity of Statutes Creating Conclusive Presumptions; and in 2 L. R. A. 773.—REPORTER.

as to the validity of the tax proceedings is ineffectual to accomplish its purpose, as it is an attempt to transfer by legislative act the title of the original holder to the vendee of the tax-sale purchaser, and that no legislature can do.

TENDER OF TAXES BY CLAIMANT AGAINST TAX PURCHASER.†

4. Under Sections 3128 and 3135, B. & C. Comp., requiring one seeking to quiet his title against a tax deed to first pay into court the amount of taxes and costs for which the premises were sold at the tax sale, together with certain other sums, does not apply to a case where the tax sale is void because of a wrong assessment, for in such a case the plaintiff is claiming by a title paramount to and unaffected by the tax proceeding, and cannot be considered as seeking to quiet his title against such sale.

From Clatsop: THOMAS A. McBRIDE, Judge.

Suit by J. E. Ferguson and C. L. Houston against George Kaboth to quiet the title to a lot in the City of Astoria. Defendant claimed under a deed from Clatsop County, which had bought the property for the unpaid taxes of 1898. Decree for plaintiffs and defendant appeals. The original opinion was written by Mr. Justice BEAN, and the opinion on the motion for a rehearing by Mr. Justice WOLVERTON.

AFFIRMED.

For appellant there was an oral argument by *Mr. G. C. Fulton*, with a brief over the name of *Fulton Bros.*, urging these points:

I. As to the effect of the curative part of section 5 of the act of 1901 (Laws 1901, pp. 71, 73, B. & C. Comp. § 3135), the legislature may validate retrospectively any proceedings which it may have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation. The only question to consider is, could the legislature have done away with the act sought to be cured? If so, then the right to cure such proceedings is unquestioned: *Mitchell v. Campbell*, 19 Or. 198 (24 Pac. 455); *Moore v. Byrd*, 118 N. C. 688 (23 S. E. 968); *In re Douglass*,

† NOTE.—On this point see, also, *Jory v. Palace Dry Goods Co.* 30 Or. 186, and *Title Trust Co. v. Aylsworth*, 40 Or. 20.—REPORTER.

41 La. Ann. 765 (6 South. 675); *In re Lake*, 40 La. Ann. 142 (3 South. 479); *Tiblier v. Land Trust Co.* 49 La. Ann. 1471 (22 South. 411, 413); *Parker v. City of Jacksonville*, 37 Fla. 342 (20 South. 538); *Strode v. Washer*, 17 Or. 50-53 (16 Pac. 926); *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439); Cooley, Tax'n, p. 229; Cooley, Const. Lim. p. 371; Black, Tax Titles, §§ 452, 482-484, *et seq.*; 3 Am. & Eng. Ency. Law (1 ed.), p. 760.

II. The deed under which defendant claims title is made by law conclusive evidence of the regularity and existence of all proceedings necessary to pass title to the lands therein conveyed, and of title in the grantee, except as against: (1) Invalidity of the assessment within the rules prescribed, or actual fraud in the assessment or collection of the tax; or (2) payment of the tax before sale, or redemption after sale, or that payment was prevented by fraud of the purchaser; or (3) that the property was sold for a tax for which neither the property nor the owner thereof was liable at the time of the assessment, and that no part of the tax was assessed or levied upon the property sold: B. & C. Comp. § 3135. These provisions were drawn on exact lines with the decision of the Supreme Court of the United States in the case of *De Trevelle v. Smalls*, 98 U. S. 517. See, also, 25 Am. & Eng. Ency. Law (1 ed.), p. 695, *et seq.*; *Gwynne v. Neiswanger*, 18 Ohio, 400; *Allen v. Armstrong*, 16 Iowa, 508; *McCready v. Sexton*, 29 Iowa, 356 (4 Am. Rep. 214); *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439).

III. The act of February 23, 1901, further provides that in any suit brought to set aside any tax sale, or quiet title against such tax sale, the person claiming to be the owner against the tax purchaser must tender and pay into court with his first pleading, the amount of the tax, etc., for which the land was sold: B. & C. Comp. § 3135. The plaintiffs made no tender, nor have they offered to make any such payment. Courts hold this provision valid and binding:

People v. Turner, 117 N. Y. 227 (22 N. E. 1022, 15 Am. St. Rep. 498).

IV. The act of February 23, 1901, also provides that all lands theretofore sold for taxes, could be redeemed at any time on or before the first day of July, 1901, but thereafter deeds should be issued with the conclusiveness above mentioned. The courts hold these laws valid and binding, as statutes of limitation: *Jenkins v. McTigue*, 22 Fed. 148; *Baldwin v. Ely*, 66 Wis. 171 (28 N. W. 392); *Lombard v. White*, 76 Wis. 445 (45 N. W. 420); *Ensign v. Barse*, 107 N. Y. 329 (14 N. E. 400); *Gwynne v. Neiswanger*, 18 Ohio, 400; *People v. Turner*, 117 N. Y. 227 (15 Am. St. Rep. 498, 22 N. E. 1022).

For respondents there was an oral argument by *Mr. John M. Gearin*, with a brief over the names of *C. H. Page* and *Dolph, Simon, Mallory & Gearin*, urging these points:

1. If at the time of sale a tax deed was only *prima facie* evidence, a change making the proceedings and deed conclusive is retroactive, impairs the contract, is an attempt to destroy vested rights, and is void: *Teralto L. & W. Co. v. Shaffer*, 116 Cal. 518 (58 Am. St. Rep. 194, 48 Pac. 613); *Maguiar v. Henry*, 84 Ky. 1 (4 Am. St. Rep. 182, note, p. 187).

2. The legislature cannot deprive one of a vested right to an existing defense. The true rule seems to be that the legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all non-essentials or matters of routine which rest in mere expediency, but the owner of the property cannot be precluded from showing the invalidity of the tax deed thereto by proving the omission of any act essential to the due assessment of the same,—the levy of a tax thereon and the sale thereof on that account. As to the performance of these acts and the facts necessary to authorize them, the deed can be made only *prima facie* evidence: *Cooley, Tax'n*, p. 230; *Smith v.*

Cleveland, 17 Wis. 556; *Prindle v. Campbell*, 9 Minn. 212; *Marx v. Hanthorn*, 30 Fed. 57; *Larson v. Dickey*, 39 Neb. 463 (42 Am. St. Rep. 595, 58 N. W. 167); *Pryor v. Downing*, 50 Cal. 388 (19 Am. Rep. 656); *McCord v. Sullivan*, 85 Minn. 344 (88 N. W. 989, 89 Am. St. Rep. 560); *French v. Edwards*, 80 U. S. (13 Wall.) 506; *Warfield-Pratt & Co. v. Averill Grocery Co.* 93 N. W. 80.

3. No lien exists for taxes assessed on personal property or real estate, except where the same is so declared by positive law: *Jory v. Palace Dry Goods Co.* 30 Or. 196, 203 (46 Pac. 786); *Desty*, Tax'n, Vol. 2, p. 734; and the sale by Twilight on October 3, 1898, of the lot in question to plaintiff's grantor was authorized, and the same was clear of the tax in question, as it was not a lien, and was prior to the levy by the county of said tax on October 26, 1898: *Allen v. Perrine*, 103 Ky. 516 (41 L. R. A. 351, 45 S. W. 500, 502).

4. Under Section 504, Hill's Ann. Laws, under which this suit is brought, no tender is necessary. This section gives the plaintiff an independent right of suit, and the same has not been modified or amended, except as to possession by plaintiff, nor can there be any subrogation, as the answer of the defendant is silent as to his title, nor is there any lien for taxes or the purchase price. If there is no warrant or demand or affidavit as the foundation of the delinquent tax sale, the sale is void and plaintiff is not obliged to tender or return taxes paid: *Moore v. Clackamas County*, 40 Or. 536 (67 Pac. 662); *Hughes v. Linn County*, 37 Or. 111 (60 Pac. 843); *Black*, Tax Titles (2 ed.), § 436.

5. In the argument in the circuit court much stress was had as to the effect of Section 2846, Hill's Ann. Laws. This section is a rule of responsibility between seller and buyer, and has nothing to do with the county as to the mode or manner of collecting taxes.

6. Taxes in this state prior to 1901 were a charge against

the person only, proportioned upon the value of his property legally assessed, to be collected primarily from his or her personalty, and a sale by a tax debtor of personalty or realty, before levy, was not subject to the payment of the tax. If there was a valid tax unpaid the same was a personal obligation, it was not lost, and should and can be collected by the county at any time or from any of the property of Mary A. Twilight: Section 2817, Hill's Ann. Laws; *Jaffray v. Anderson*, 66 Iowa, 718 (24 N. W. 527); *Hughes v. Linn County*, 37 Or. 111 (60 Pac. 843); *Castle v. Anderson*, 69 Iowa, 428 (29 N. W. 400).

MR. JUSTICE BEAN delivered the opinion.

This is a suit to quiet title to real estate. From March 1 to October 3, 1898, Mary A. Twilight was the owner in fee simple and in possession of the property in controversy. On the 11th of April of that year a decree was rendered by the circuit court in favor of C. H. Page and against her, foreclosing a mortgage on the property, and ordering a sale thereof to satisfy such decree. In pursuance of an execution issued thereon the property was sold to Page by the sheriff May 23, the sale confirmed June 1, and the sheriff's deed delivered October 3, 1898. Page immediately went into possession, and afterward conveyed to the plaintiffs. Some time between the 1st of March and 26th of September the assessor listed the property for taxation to Mrs. Twilight, and on the 26th of October the county made the levy of taxes for the year 1898. The assessment roll, with the tax extended, or pretended to be extended, was delivered to the sheriff in February, 1899, and such proceedings were thereafter had that an attempted sale of the property was made to the county for alleged delinquent taxes for the year 1898. The defendant has succeeded to the interest of the county.

1. Several objections are made to the validity of the

defendant's title on account of alleged defects in the proceedings for the assessment and collection of the tax and the sale of the property, but it is unnecessary to consider them, because the case cannot be distinguished in principle from *Middleton v. Moore*, 43 Or. 357 (73 Pac. 16). That was a suit to foreclose a mortgage. The defendant set up title to the mortgaged premises under a tax deed, based upon an assessment and levy of taxes made subsequent to the execution of the mortgage. It was held that, under the statute in force in 1898 (being the one applicable to the case in hand), the mortgage took precedence over the tax deed, that the tax was not a lien upon the property, and that the purchaser at the tax sale acquired only the interest therein of the person in whose name it was listed on the assessment roll. Mrs. Twilight had no interest in the land in controversy, either at the time of the levy of the tax thereon or of the sale, and therefore, under the doctrine of the *Middleton Case*, the purchaser acquired none.

2. Some stress seems to be laid on Section 2846, Hill's Ann. Laws 1892, as indicating an intention to impose the duty of paying taxes upon the grantee of land who acquires the title thereto after the assessment, and before the date of the warrant authorizing the collection thereof. This section, however, was simply designed to define the respective rights of a grantee and grantor of land upon which taxes had been assessed, as between themselves. Under the statute, property was required to be listed to the taxpayer as of the 1st of March of each year: Laws 1893, p. 6. He became personally liable for the payment of the tax thereon, which might be enforced by seizure and sale of his personal property. Notwithstanding he might sell and convey real estate after the 1st of March, and before the date of the tax warrant, he could be compelled to pay the tax; but, if so, the statute gave him a

remedy over against his grantee, unless there was an express agreement between them on the subject.

3. Much reliance is placed upon the act of 1901 which attempts to cure defects in tax titles: *Laws 1901*, p. 71. But assuming the several provisions of the act relied on to be valid, it cannot aid the defendant in this suit. The legislature may cure, retrospectively, irregularities and imperfections in tax proceedings, but it cannot infuse life into an utterly void proceeding, or take the property of one person and transfer it to another: *Denny v. McCown*, 34 Or. 47 (54 Pac. 952); *Teralta Land Co. v. Shaffer*, 116 Cal. 518 (48 Pac. 613, 58 Am. St. Rep. 194); *Maguiar v. Henry*, 84 Ky. 1 (4 Am. St. Rep. 182); *Larson v. Dickey*, 39 Neb. 463 (58 N. W. 167, 42 Am. St. Rep. 595). Under the law as it stood at the time of the tax sale, the purchaser acquired no title to the property in controversy, because it did not belong to the person in whose name it was listed for assessment at the time the tax was levied or the sale made, and no subsequent act of the legislature could enlarge the purchaser's rights, or vest in him the title then held by another. The effect of the defendant's contention, if sustained, would be to vest in the purchaser at the tax sale the title, not of Mrs. Twilight, but of Page, and this the legislature had not the constitutional right to do: *Merrill v. Dearing*, 32 Minn. 479 (21 N. W. 721); *McCord v. Sullivan*, 85 Minn. 344 (88 N. W. 989, 89 Am. St. Rep. 561); *Black, Tax Titles* (2 ed.), § 353. The decree of the court below is therefore affirmed.

AFFIRMED.

ON MOTION FOR REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

4. In their petition for rehearing counsel for appellant strongly urge upon the attention of the court the point made in their original brief and argument, but not con-

sidered in the opinion, namely, that the plaintiffs could not maintain their suit to quiet title without first having tendered and paid into court the amount of the taxes and costs for which the premises were sold at the tax sale, together with all taxes since paid by the purchaser, and interest, as provided by statute (B. & C. Comp. § 3128, and latter clause of section 3135). The point was not deemed vital, which accounts for its being passed over. We have now carefully reëxamined the question involved, and, notwithstanding the able and exhaustive presentation thereof in the petition, are borne to the same conclusion as before. The simple solution of the problem is to be found in the fact that the foreclosure by Page of his mortgage cut off the tax charge against Mary A. Twilight for which her interest in the property was subsequently attempted to be sold, as there can be no reasonable doubt from the record that the mortgage antedated the tax. Mrs. Twilight therefore was taxed upon her derivative title, or such interest only as she had in the property subject to the mortgage; and when the mortgage was foreclosed, and a deed executed in pursuance thereof, it supplanted the estate taxed, and Page succeeded to the absolute fee-simple title, so that there was no vestige of her estate left upon which to found the tax title. The plaintiffs are not claiming through Mrs. Twilight's derivative title, the one that was assessed to her, but through a superior and paramount title, one that was affected in no way by the tax proceedings and sale; so that they are not asserting title to the land as against a party claiming under a tax sale of their estate or title, within the purview of the statute sought to be invoked. This seems to us to be the logical sequence of the doctrine of *Middleton v. Moore*, 43 Or. 357 (73 Pac. 16), which controlled the main opinion, and which we yet believe to be sound.

REHEARING DENIED.

Decided 27 April, 1903.

PORTLAND v. OREGON REAL ESTATE CO.

[72 Pac. 322.]

VOID PUBLIC IMPROVEMENT—POWER OF COUNCIL—CURATIVE ACT.

Section 156 of the Portland Charter of 1898 (Laws 1898, pp. 101, 163), providing for an action by the city to recover the cost of a public improvement that shall have been judicially declared invalid, does not apply to a case where the city lost its power by the filing of a valid remonstrance. The filing of a valid remonstrance against a public improvement deprives the city entirely of the power to proceed further therewith, its subsequent proceedings in such matter, if any, are wholly void, and the city cannot invoke the supplemental remedy provided by section 156.

From Multnomah: MELVIN C. GEORGE, JOHN B. CLELAND, and ALFRED F. SEARS, JR., Judges, in joint session.

This is an action by the City of Portland against the Oregon Real Estate Company, instituted under section 156 of the 1898 charter of the City of Portland (Laws 1898, p. 163), to collect the amount assessed against abutting property of the defendant by the common council of the city for repairs made upon an elevated roadway. On July 22, 1897, the common council, by ordinance, declared it expedient and necessary to make the repairs, and directed that the cost thereof should be assessed upon the adjacent property in the manner provided by sections 114 and 115 of the charter of 1893 (Laws 1893, pp. 846, 847), under which the council was then acting. The defendant company, which was the owner of more than one half of the property affected, interposed a remonstrance to the making of such repair, which was disregarded by the council, the repair made, notwithstanding, at a considerable cost, and an assessment for the amount levied against its property. Feeling aggrieved, defendant by a suit in equity had the city enjoined from enforcing the collection of the assessment, and it was finally decreed by this court, on appeal, that such proceedings were rendered void by reason of the common council's disregard of the remonstrance (*Oregon Real Estate Co. v. Portland*. 40 Or. 56, 66 Pac. 442), where-

upon this action was instituted to enforce collection, notwithstanding the proceedings of the common council were thus invalidated.

There was a demurrer to the complaint, which being overruled, and defendant refusing to plead further, judgment was rendered against it, from which this appeal is prosecuted.

REVERSED.

For appellant there was a brief over the name of *Pipes & Tift*, with an oral argument by *Mr. Martin L. Pipes*.

For respondent there was a brief and an oral argument by *Lawrence A. McNary*, City Attorney, and *Mr. John P. Kavanaugh*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion.

The principal contention of defendant, and one that we believe to be fatal to the plaintiff's cause of action, is that the remonstrance to the common council against the repair was effective to divest it of all power to proceed further in the premises, and hence that the case does not come within the purview and intendment of said section 156 (Laws 1898, pp. 101, 163). This requires a construction of the section alluded to, so far as it has a bearing upon the present controversy. It provides, *inter alia*, that, in the event any assessment heretofore made or levied by the city for the improvement or repair of a street, when the cost thereof has been declared by the common council to be a charge upon the adjacent property, shall have been or shall hereafter be found, declared, or adjudged to be invalid or uncollectible for any reason, whether because of any defect, jurisdictional or otherwise, or any insufficiency, irregularity, or informality whatever in the original petition therefor, if any, or in any stage of the proceedings, the city shall have power to bring an action in the circuit court against the owner or owners of the lot or lots, etc.,

upon which the cost of such improvement or repair might or could be charged or imposed under the terms of this act, and recover from such owner or owners the proportion of the cost of such improvement or repair heretofore charged to such lot or lots. In the preceding clauses of the same section, provision is made for bringing like actions, under similar conditions, where the improvements or repairs shall have been made subsequent to the adoption of the charter of 1898. By the charter of 1893 the repair in question was deemed to be an improvement, as the cost thereof was directed to be assessed against the adjacent property: *Cook v. Portland*, 35 Or. 383 (58 Pac. 353). The mode by which the common council acquired jurisdiction to proceed in case of an improvement was by a petition of the owners of one third of the property affected thereby, and notice published in some daily newspaper in the City of Portland for ten days, but it was provided (Laws 1893, pp. 810, 843, § 100,) that the owners of more than one half of the adjacent property might, within ten days after final publication of such notice, make and file with the auditor a written remonstrance against the proposed improvement, and that thereupon the same should not be further proceeded with or made, and that any improvement so defeated should not be again proposed for six months, except upon the petition of the owners of two thirds of such property.

The charter of 1898, in prescribing the mode for obtaining jurisdiction, dispensed with the petition, but not the notice. This latter was required to be given by posting in the manner specified, as well as by publication. The provision permitting a remonstrance to be filed by the owners of more than one half of the adjacent property was retained, and it was declared that such remonstrance should be a bar to any further proceedings in relation to the work or improvement for a period of six months, unless the

owners of one half or more of such adjacent property should subsequently petition therefor; but that in case no such petition should be filed, and the common council should again propose to do the same work, like proceedings should be had in relation thereto as in the first instance. Thus it will be seen that the office or effect of the remonstrance under the charter of 1893 was to defeat the improvement, and under that of 1898 to bar it, which means the same thing. It was an instrument in either case, not to be used for acquiring jurisdiction, but one to be employed or not, as the property holder might deem advisable, to defeat or divest the common council of jurisdiction to proceed further unless subsequently invested with power so to do in the manner prescribed. It was a remedy provided by the charter, of which the property holder had a right to avail himself when it appeared to him that his property was going to be incumbered with an assessment for an improvement or repair, and when he filed his remonstrance it operated as an answer in bar. It defeated that particular proceeding, and the common council could go no further therein. It might have begun anew after six months, but it must have been by another and different proceeding.

Now, in providing the remedy given by section 156, by which the assessment might be collected despite any defects attending the proceedings by which it was made or levied, jurisdictional or otherwise, was it the intention of the legislature to deprive the property holder of this important right or privilege? For, if the common council may disregard a valid remonstrance, make the improvement and the assessment, and have the latter enforced by an action at law after it has been declared inoperative and void by a court of equity, then is the property holder shorn of his right to remonstrate, and of his remedy, through the instrumentality of the remonstrance, to defeat or bar the

proceedings by which the assessment is levied. The remedy could not then avail him in any event, either to defeat or to bar the proceedings. Such a construction should be adopted as will give effect to all of these provisions, if possible. As we view the matter, there is no repugnance. In the first place, the city is given a remedy whereby it may require the adjacent property to answer for the cost of improvements or repairs made in its streets or avenues, and a mode is prescribed by which the common council may acquire jurisdiction to assess the cost to such property. If it has proceeded irregularly in the acquirement of such jurisdiction, or its proceedings were so defective in other respects as to invalidate them, then section 156 provides an additional remedy whereby the assessment may be collected, despite the invalidity of the proceedings, after such invalidity has been so declared and adjudged: *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439). These are remedies provided for the city. Now, upon the other hand, the charter has accorded the property holder his remedy to defeat the proceedings, and consequently the assessment, through the instrumentality of the remonstrance. These remedies should not be confounded or confused. Nor should we mistake a prescribed essential in the mode of procedure by which the remedy is invoked for the remedy itself, or *vice versa*, the remedy for such an essential; and it is a fallacy to say that the absence of a remonstrance is an essential to the acquirement of jurisdiction by the common council, for, if no remonstrance be filed, the jurisdiction which may have previously attached is not disturbed, and the improvement may be made. If the city has pursued its first remedy defectively, it may invoke the additional one. However, a refusal of the common council to consider the property holder's valid remonstrance is not in any sense a defect in the mode by which it may acquire jurisdiction, but is rather a denial of the right to remonstrate, or of the remedy ac-

corded him for defeating the assessment. There is no repugnancy, therefore, in giving effect to all the remedies accorded, and when the property holder has invoked his remedy by a sufficient remonstrance he has effectively barred the proceeding, so that there is henceforth no opportunity for the city to invoke its additional remedy. Whatever the common council may have done thereafter in levying the assessment was absolutely and wholly void for want of power to act. We conclude, therefore, that it was not the purpose of the legislature, by the adoption of section 156, to impair or defeat the property holder's remedy to defeat or bar the assessment by remonstrance if he chose to invoke it, and that the action provided for in said section was not designed to extend to a case like the present, where the assessment has been levied notwithstanding the interposition of a valid and sufficient remonstrance to the proceedings. Were we to hold otherwise, it would certainly result in according to the common council an unwarranted discretion as to whether it should permit the property holder to avail himself of his remedy or not. It might, if it chose to do so, consider a remonstrance in one case, whereas, in another of equal merit, it could disregard it, and allow the proceedings to be invalidated by a suit in equity, and then validate them by an action at law. This would work an inequality, and perhaps an injustice, in many instances, which we are constrained to believe was not within the intendment of the legislature.

In this view of the charter and the purpose of section 156, the demurrer to the complaint should have been sustained. The judgment of the trial court will therefore be reversed, and the cause remanded thereto, with a direction to sustain the said demurrer, and for such further proceedings as may be deemed proper, not inconsistent with this opinion.

REVERSED.

Argued 7 July, decided 8 August, 1908.

REID v. ALASKA PACKING CO.

[73 Pac. 337.]

48	426
43	880
43	429
46	271

SALES—RATIFICATION OF UNAUTHORIZED ACT OF AGENT—RES GESTÆ.

1. Where an agent of a seller has exceeded his authority, declarations of the seller's officers, on receiving a memorandum of the contract, is admissible in the buyer's action for a breach, both as part of the *res gestæ* and as bearing on the question of ratification.

CONTRACT VOID FOR IMPOSSIBILITY OF PERFORMANCE.

2. To excuse performance of a valid and lawful contract, made upon a sufficient consideration, it must appear obviously impossible of performance in the nature of things by any one, mere impossibility of execution by the promisor is not enough. To illustrate: A contract to sell salmon packed in Alaska, the fish to be "exactly like Puget Sound fancy Sockeye," is not void as stipulating for the impossible, though, so far as known, fish of that sort are not found in Alaska at the present time; for the country is known to be still unexplored, and if such fish are not there, they may be caught elsewhere and packed in Alaska.

CONTRACT OF SALE AND PURCHASE—STATUTE OF FRAUDS.

3. A contract for the sale of goods exceeding fifty dollars in value, memoranda of which, executed by a broker who represents both parties, are delivered to and retained by each, the contract being also entered in the broker's books, is not within the statute of frauds.

CONTRACT TO SELL AND BUY—EXPRESSION OF CONSIDERATION.

4. A written contract whereby one party covenants to buy and the other to sell specified goods exceeding fifty dollars in value is not within the statute of frauds, as failing to express a consideration; the mutual promises constituting considerations.

From Clatsop: THOMAS A. McBRIDE, Judge.

This is an action by Reid, Murdoch & Co., a corporation, against the Alaska Fishermen's Packing Co., also a corporation, to recover damages for a breach by the defendant of an alleged contract to sell and deliver to the plaintiff 2,500 cases of canned salmon. The plaintiff is engaged in buying and selling salmon, with its place of business in Chicago, and the defendant in packing salmon in Alaska for sale. In March, 1899, the defendant employed C. M. Webber & Co., brokers of Chicago, to act as its agent or broker in selling its salmon in Illinois and adjoining states. Frank Patton, of Astoria, was instrumental in negotiating the contract of brokerage, and, under an arrangement with Webber & Co., was to receive a

certain percentage of the commissions on the sales made by them. On April 3, 1899, Webber & Co. contracted to sell and deliver to the plaintiff for account of the defendant 2,500 cases of salmon, and forwarded to Patton at Astoria for delivery to defendant a memorandum of the contract as follows:

"Alaska Fisherman Packing Co.,
Original.

Mark Invoice Dept. 12. No. 8364.

[10c. Rev. Stamp.]

Chicago, April 3rd, 1899.

Sold to Reid, Murdoch & Co.

For account of Alaska Fishermen Pkg Co.

Astoria, Oregon.

2500 cases 1 lb. tall fancy Sockeye Salmon at \$1.00 f.o.b. Astoria, Oregon, unlabeled; allow cost of sellers labels. Quality to be equal to best Puget Sound fancy Sockeye—Price guaranteed against decline in the market up to date of shipment—Shipment to be as early as any Puget Sound Fish—Destruction of cannery or vessel with the Salmon shall cancel this contract.

Terms ——— days, or cash less $1\frac{1}{2}$ per cent upon arrival & approval in Chicago.

Buyers to be furnished with invoice and satisfactory delivery papers in time to make, at their option, full discount settlement.

Shipping directions to follow.

Mark invoice and each package No. "C 930 Salmon" Reid, Murdoch & Co. guaranteed against loss or damage from swells and spoils for six month from date of delivery.

C. M. Webber & Co."

Patton delivered the memorandum to the officers of the defendant, who refused to accept or confirm the contract, because the company did not pack or deal in fish of the quality specified therein, and it would not agree to furnish salmon of that kind. The contract was thereupon returned to Webber & Co., and subsequently modified by a memorandum entered into between them as defendant's agent

and the plaintiff, stipulating "that the salmon may be packed in Alaska, but shall be exactly like Puget Sound fancy Sockeye." The defendant was advised of the modification, but denies that it ever authorized or ratified the contract, or that it ever became binding on it, thus presenting one of the principal issues in the case.

The defendant had a verdict and judgment, and plaintiff appeals, assigning as error (1) the admission in evidence of the statements and declarations of the officers of the defendant, made at the time the contract was delivered to them by Patton, and (2) in instructing the jury as follows :

"Here is a contract that requires these people to produce a certain salmon to be packed in Alaska, but which are to be exactly like Puget Sound fancy Sockeye salmon. Suppose these contracts had been ratified by the acts of this company, and had led Reid, Murdoch & Co. to believe they were going to carry out the contract, then what would it amount to? If a man contracts to do a thing that is within the bounds of human possibility to accomplish, it does not matter whether he makes a hard bargain, so long as it is within the bounds of human possibility. And if it was within the bounds of human possibility for them to furnish those salmon, or if Reid, Murdoch & Co. had a right to suppose it was within the bounds of human possibility, they would have to do it. They had no business to enter into a contract, and mislead people who do not know about it, on the theory they are able to carry it out. But if two men undertake a contract that is not a human possibility, and both of them know it is not a human possibility, then the contract is void. A man cannot claim damages for the breach of a contract that he knew was absolutely impossible when he made it. One of those cases I remember when I was a school boy, where a man contracted to go from Rome to London in a day. The man that contracted to do that knew it was an impossibility to do it, and the man that contracted with him knew it was impossible. A man cannot contract, as a matter of law, to do anything that is absolutely impossible. If it was a human possibility anywhere in Alaska for these people to get fish as good as

Puget Sound fancy Sockeye, then they had to do it. If they were mistaken, and believed it was possible, and the purchasers believed it was possible, although even improbable, then they have to comply with their contract.

"Suppose Reid, Murdock & Co. knew the quality of the fish that could be packed in Alaska, and knew as a matter of fact, when they entered into this contract, that it was physically and absolutely impossible for these men to get a quality of salmon equal to Puget Sound Sockeye salmon, and with that knowledge they entered into the contract, knowing it was absolutely impossible, and there was no such salmon in Alaska, then they could not claim anything but the furnishing of the very nearest approach to that that could be packed in Alaska. But if they did not know it was an absolute impossibility, or did not know anything about it, and if these parties went into a hard contract of that kind, they would be bound by it. But if the party knew there was not any such fish there, then they could not claim anything more than what was within defendant's power to do. But if the buyer was ignorant, and did not know but what it was possible to get such salmon as that, then the company has got to do it, or pay the damages for not doing it.

"Suppose a contract like Fulton stated to the jury, to furnish a dozen grizzly bears caught in Clatsop County, and the buyer knew there wasn't a grizzly bear in the county, he could'nt claim damages because I did not furnish him the grizzly bears. But suppose a stranger came here, and did not know but what there were grizzly bears in the outskirts of Astoria, and I led him to enter into such a contract, I would have to do it, or pay damages for not doing it. Take it in this case: It is a question of fact, under all the circumstances of the case, to say whether these men in Chicago had such knowledge of the kind and quality of fish caught in Alaska, under all this testimony, as would lead them to believe, or call them to a knowledge of the fact, it was a physical impossibility to produce or comply with a contract to furnish salmon equal in quality to Puget Sound Sockeye salmon. If it was impossible, and they knew it, and contracted for it, then they cannot recover in this case. If it was an impossibility even, and they did

not know it, or even if they had reason to believe it was a human impossibility, then, so far as the contract is concerned, if it was ratified, and it was a good contract, they would not be bound by it. I think it depends first on the ratification of this contract—whether these parties ratified it; and the other proposition I have gone over.”

REVERSED.

For appellant there was a brief over the names of *Frank Spittle* and *Clifton R. Thomson*, with an oral argument by *Mr. Spittle*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. G. C. Fulton*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion.

1. We think that the evidence was competent as to the statements made by the officers of the defendant, when the memorandum was delivered to them by Patton, to the effect that they would not ratify or confirm the contract because the defendant did not pack or deal in salmon of the kind specified therein. It is admitted that Webber & Co. exceeded their authority in making the contract of warranty as to the quality of fish. In order to render the defendant liable thereon, it was necessary, therefore, for the plaintiff to show that it had ratified the contract, either in express terms or by silence and acquiescence. One material act in the alleged ratification was the delivery of the memorandum of the contract to defendant, thus advising it of the contents thereof. What was said at the time explaining the act of delivery and illustrating its character was competent as part of the *res gestæ*, and as tending to show the want of an express ratification: 1 Greenl. Ev. (15 ed.), § 108; *Feagon v. Cureton*, 19 Ga. 404; *Wetmore v. Mell*, 1 Ohio St. 26 (59 Am. Dec. 607); *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 181; *Currier v. Boston & Maine R. Co.* 34 N. H. 498.

2. The instruction that an agreement to do something which both parties know at the time to be physically impossible cannot be enforced is sound as an abstract proposition of law. "A mutual undertaking between parties," says Mr. Bishop, "to do what both know to be impossible, is vain and idle, lacking the elements of contract, and no suit can be maintained thereon": Bishop, Cont. § 579. And Mr. Clark says: "A promise to do something which is either impossible in law or physically impossible is no consideration": Clark, Cont. 181. Before one can be excused, however, from the performance of a valid contract, deliberately entered into, because of the impossibility of performance, it must appear that the thing agreed to be done is impossible upon its face, and cannot, by any means, be effected. It is no excuse for the nonperformance of a contract that it is impossible for the obligor to fulfill it, if the performance be in its nature possible. "If the covenant be within the range of possibility," says Mr. Chief Justice NELSON, "however absurd or improbable the idea of the execution of it may be, it will be upheld—as where one covenants it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible. * * If a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages; his liability arising from his own direct and positive undertaking": *Beebe v. Johnson*, 19 Wend. 500 (32 Am. Dec. 518).

There is a marked distinction, not to be overlooked in this connection, between a mere disability or inability of

a party to perform a contract and the absolute and inherent impossibility of performance in the true sense. Thus, it is a defense to an action on a contract for the sale of specific property that the property had ceased to exist when the contract was entered into, or had perished or been destroyed before the time of performance, because in that event performance is physically impossible: *Dexter v. Norton*, 47 N. Y. 62 (7 Am. Rep. 415); *Wells v. Calnan*, 107 Mass. 514 (9 Am. Rep. 65). A contract, however, to make and deliver a quantity of goods by a stated time, may become impossible in fact by the destruction of the vendor's mill or factory; but that would be no excuse (*Jones v. United States*, 96 U. S. 24; *Booth v. Spuyten Duyvil Mill Co.* 60 N. Y. 487), unless, perhaps, the agreement was to produce or manufacture the goods in the vendor's own mill which had been destroyed: *Howell v. Coupland*, L. R. 9 Q. B. 462. Unless an act is inherently impossible within itself, a contract to do it is binding, although the performance may be improbable, or even impossible, to the promisor. To excuse performance, the impossibility must be something more than merely a great inconvenience, hardship, or even impracticability. "If one, for a valid consideration, promises another to do that which is in fact impossible," says Mr. Parsons, "but the promise is not obtained by actual or constructive fraud, and is not, on its face, obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract; not, in fact, for not doing what cannot be done, but for undertaking and promising to do it": 2 Parsons, Cont. (7 ed.) *673. Mr. Clark says that the thing agreed to be done must be impossible on its face, not merely improbable, or impossible to the promisor: Clark, Cont. § 181. And Mr. Chitty, that it must be "naturally impossible": 1 Chitty, Cont. (11 Am. ed.) 64. The doctrine is well illustrated by the early case of *Thornborow v. Whitacre*, 2 Raym.

1164. In that case the defendant, for a valuable consideration, promised to deliver to the plaintiff two grains of rye corn on a certain Monday, and to double the quantity in geometrical progression on each succeeding Monday for a definite time. It was insisted that the agreement was void, and impossible of performance, because there was not enough rye in the world with which to comply therewith. In support of this proposition it was argued that there were three sorts of impossibilities which excuse a party to a contract from its performance: (1) An impossibility in law; (2) a natural impossibility, preventing performance from the nature of the thing; and (3) impossibility in fact, although there be no inherent impossibility in the nature of the thing stipulated to be performed. But the court overruled the defense, Mr. Chief Justice HOLT saying that, where a man will, for a valuable consideration, undertake to do an impossible thing, though it cannot be performed, yet he shall answer in damages, and that the impossibility urged in the case was only impossible in fact and with respect to the defendant's ability, which was not such an impossibility as would make the contract void.

The rule to be deduced from the authorities is that, if one enters into a valid contract, for a sufficient consideration, to do a lawful thing, possible in itself—that is, in the nature of things—to be done, he must either carry out the contract according to its terms or answer in damages for a failure to do so. The mere impossibility of performance in fact will not be enough, but the contract must be obviously impossible upon its face before such a defense can be made: *The Harriman*, 76 U. S. (9 Wall.) 161. Now, applying this rule to the contract under consideration, it cannot, we think, be held that the packing of salmon in Alaska “exactly like Puget Sound fancy Sockeye” is inherently impossible. It will be readily conceded that salmon

of this class can be packed in Alaska if they can be found there, and, even if they cannot be found there, they can be taken there and packed ; hence it is clearly possible to pack them in Alaska. But, going further, and assuming that the contract contemplates that the salmon were to be both caught and packed in Alaska (although it is not so stipulated), yet the performance is not so physically or obviously impossible as to be an excuse for failing to comply with the contract. The waters and bays of Alaska cover many thousands of miles, and a very large part is undeveloped and unexplored. Even if heretofore no salmon have been found in the waters of that country exactly like the Puget Sound fancy Sockeye, it furnishes no proof that they are not there, or cannot be taken there and packed. Impossibility of performance, as a defense, does not rest nor can it be based upon a mere improbability, or even an impossibility in fact, but it must appear on the face of the contract and from its nature that the performance is absolutely and physically impossible ; otherwise the contract must be held valid and binding. The defendant was engaged in the business of packing salmon in Alaska, and knew, or should have known, whether it was possible for it to comply with the contract. If, with this knowledge, it deliberately stipulated to furnish to the plaintiff a certain quality of fish, it must live up to its contract, or answer in damages for a failure to do so ; nor can it urge as a defense the mere impossibility of performance. It was error, therefore, to give the instruction complained of, because it was not applicable to the contract under consideration.

3. It is argued, however, that the error was harmless, for the contract itself is invalid, because (1) it is unilateral, and not binding upon plaintiff, and (2) it is an agreement for the sale of personal property at a price in excess of \$50, and does not express a consideration. Neither of these points was made in the court below, and it is probable that

all the evidence bearing on the validity of the contract from this point of view was not given at the trial. It is doubtful, therefore, whether we should now consider the question suggested. Enough does appear, however, to show that the contract was made by a firm of brokers, probably acting as the agents of both parties—of the defendant to sell, and of the plaintiff to buy. The memorandum delivered by them to the defendant through Patton is in form a sold note. It is probable they delivered a bought note to the plaintiff, and entered the contract in their books. If so, their signature was the signature of both parties, and, if the notes were retained without objection by such parties, the contract is mutually binding upon them, and is a good contract of sale and purchase: *Butler v. Thomson*, 92 U. S. 412; Benjamin, Sales (7 ed.), § 277; Browne, Stat. Frauds (4 ed.), § 351; 4 Am. & Eng. Ency. Law (2 ed.), 751.

4. This view disposes of the other question, because the promise of the plaintiff to purchase was a good consideration for the promise of the defendant to sell, and therefore the contract does express a consideration: *Bishop*, Cont. § 76. The judgment of the court below is reversed, and a new trial ordered.

REVERSED.

Argued 9 July, decided 3 August, 1903.

GELDARD v. MARSHALL.

[73 Pac. 380.]

MASTER AND SERVANT—QUESTION OF NEGLIGENCE FOR JURY.

1. A servant was injured by the fall of a heavy timber, due to the breaking of the rope by which it was being lowered. The master was personally superintending the work. The rope had been in use in the work for some time, was old, and, owing to the manner of doing the work, was subject to constant chafing over sharp edges. It broke without extraordinary strain, and had parted the day before. *Heid*, that the evidence required the submission of the master's negligence to the jury.

ASSUMPTION OF RISK BY SERVANT.

2. A servant who has assisted but once in lowering timbers by a rope, being then assigned to other work, does not assume the risk of the rope's breaking, even though he knows it parted the previous day through the alleged carelessness of a workman; it not appearing that he had actual knowledge of any defect therein. Moreover, knowing of the breaking, he had a right to assume that a new rope had been substituted by the master.

From Multnomah : ARTHUR L. FRAZER, Judge.

This is an action by Matthew Geldard against J. I. Marshall to recover damages for an injury to the plaintiff alleged to have been caused by the negligence of the defendant. In October, 1901, the defendant was building an elevated roadway at Inman, Poulsen & Co.'s mill in Portland, and plaintiff was employed by him upon the work. The roadway was supported by three rows of piling driven in the ground. Upon the top of each row was placed a plate or cap, twelve inches square, of rough timbers. A part of the work consisted in fastening the rows of piling together with braces, one end of each brace being nailed or spiked near the top of one pile and at the bottom of a pile in the adjoining row. These braces were 4x12 inches in size, and from twenty-eight to thirty-four feet long, weighing about 500 pounds each. They were lowered to their respective places from the top of the caps in about the following manner: The defendant and one of his workmen, standing on a platform near the top of a row of piles to which the upper end of the brace was to be fastened, pushed or shoved the brace out toward the opposite row of piles; and a workman standing on the cap of the latter, by slacking a rope attached to the end of the brace, and passing once around the cap on which he was standing, lowered the end to the place where it was to be fastened near the bottom of the pile. There were forty-eight of these braces used in the work, and all were thus put in place. While the defendant and two of his workmen were engaged in lowering the last one, the rope parted, and the brace fell, striking and knocking down a platform upon which plaintiff was working, and precipitating him to the ground, a distance of twenty-five or thirty feet. The plaintiff had been working on the job for the defendant about ten days. His work did not require him to use the

rope, and he had nothing to do with lowering the braces. A few days before, however, he handled the rope in lowering one brace; but, being too slow to suit the defendant, he was detailed to other work. His duty at the time of the accident was to follow along after the other workmen, and securely spike the braces near the top of one row of piling after they had been put in place, which he was doing when the accident occurred. The rope which broke was three fourths or one inch in diameter, and there was evidence tending to show that it was an old one. The defendant had used it in the manner described in lowering all the braces, and it had parted the day before. Dakin, who was handling the rope at the time of the accident, testified that he was following the orders of the defendant, who was personally present, directing the operations; that he lowered the brace as carefully as he could; that at the time the rope broke it was not moving, because the defendant had ordered him to hold the brace stationary while he and the other workman were putting their end of the brace in place. Meyer, who was also assisting the defendant at the time, testified that he and the defendant were driving the brace in place when the rope parted, but he did not notice how Dakin was letting the rope out. E. D. Pittman, a cordage man, was called to show that using a rope in lowering heavy timbers in the manner described would have a tendency to chafe and soon wear it out. The negligence charged is that the rope which broke and allowed the brace to fall was unsafe, defective, and insufficient, to the knowledge of the defendant. The answer sets up three defenses: (1) That plaintiff so carelessly allowed his attention to be diverted from his surroundings and duties as to step and fall from the platform; (2) that he assumed all the risks and dangers connected with and incident to the use of the rope, as a part of his employment; and (3) that his accident was due to the negligence of a fellow servant.

At the close of the plaintiff's testimony, the court directed a nonsuit, and from the judgment entered thereon the plaintiff appeals.

REVERSED.

For appellant there was an oral argument by *Mr. Stewart B. Linthicum*, with a brief over the name of *Williams, Wood & Linthicum* to this effect:

I. It is the duty of the master to provide and maintain reasonably safe and suitable appliances for the conduct of the work: *Miller v. Southern Pac. Co.* 20 Or. 285 (26 Pac. 70); *Knahila v. Oregon S. L. Ry. Co.* 21 Or. 136-143 (27 Pac. 91); *Mast v. Kern*, 34 Or. 247 (75 Am. St. Rep. 508, note, 5 Am. Neg. Rep. 88, 54 Pac. 950); *Brunell v. Southern Pac. Co.* 34 Or. 257 (5 Am. Neg. Rep. 711, 56 Pac. 129); *Wagner v. Portland*, 40 Or. 389, 403 (60 Pac. 985, 67 Pac. 300); *Johnson v. Portland Stone Co.* 40 Or. 436, 440 (67 Pac. 1013, 68 Pac. 425); *Robinson v. Taku Fishing Co.* 42 Or. 537 (71 Pac. 790).

II. Where an appliance is used in a proper manner and a break occurs, the break is in itself evidence that the appliance was defective, and that the master was negligent: *Moynihan v. Hills Co.* 146 Mass. 586 (4 Am. St. Rep. 348, 16 N. E. 574); *White v. Boston & A. R. Co.* 144 Mass. 404 (11 N. E. 552); *Feital v. Middlesex R. Co.* 109 Mass. 398 (12 Am. Rep. 720); *Railroad Co. v. Walrath*, 38 Ohio St. 461 (43 Am. Rep. 433); *Westland v. Gold Coin Mines Co.*, 101 Fed. 59; *Barnowski v. Helson*, 89 Mich. 523 (50 N. W. 989, 15 L. R. A. 33); *Mulcairns v. Janesville*, 67 Wis. 25 (29 N. W. 565); *Bahr v. Lombard*, 58 N. J. Law, 233 (21 Atl. 190).

III. Risks arising from negligence of the master are not risks ordinarily incident to employment, and are not assumed by the servant: *Conlon v. Oregon S. L. Ry. Co.* 23 Or. 499, 502 (32 Pac. 397); *Wild v. Oregon S. L. Ry. Co.* 21 Or. 159, 164 (27 Pac. 954).

IV. The servant has a right to assume that the master

will furnish safe and proper appliances, and keep the same in good repair: *Johnston v. Oregon S. L. Ry. Co.* 23 Or. 94, 104 (31 Pac. 283); *Railway Co. v. Archibald*, 170 U. S. 665 (18 Sup. Ct. 777); *New York, N. H. & H. R. R. Co. v. O'Leary*, 93 Fed. 741; *Achison R. Co. v. Swarts*, 58 Kan. 235; *Delude v. St. Paul City Ry. Co.* 55 Minn. 63 (56 N. W. 461); *Kranz v. Long Island Ry. Co.* 123 N. Y. 1 (25 N. E. 206, 20 Am. St. Rep. 716).

For respondent there was an oral argument by *Mr. Jerry E. Bronaugh*, with a brief over the name of *Bronaugh & Bronaugh* to this effect:

(1) A master is not an insurer of the safety of his servant, and is therefore not bound to furnish absolutely safe appliances. His duty in this behalf is discharged when he furnishes reasonably safe appliances, and he is presumed to have done so, and the burden of proving the master negligent rests upon the complainant, nor, in this State, can the doctrine of "*Res ipsa loquitur*" be substituted for this proof: *Duntley v. Inman*, 42 Or. 334 (70 Pac. 529, 59 L. R. A. 785); *Kinkaid v. Oregon S. L. Ry. Co.* 22 Or. 35 (29 Pac. 3); *Nutt v. Southern Pac. Co.* 25 Or. 291 (35 Pac. 653); *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250; *Knahlla v. Oregon S. L. Ry. Co.* 21 Or. 136 (27 Pac. 91). From the fact that an appliance broke once before when used by a different person under different circumstances no presumption of its being defective could legally arise.

(2) A servant has the right to assume that the master will furnish, and has furnished, reasonably safe and suitable appliances, but if the servant ascertains, or has reasonable opportunity to ascertain, that he has not done so, but has furnished unsafe and defective appliances, and thereafter continues to use them without a promise on the master's part for betterments, he does so at his own peril: *Duntley v. Inman*, 42 Or. 334 (59 L. R. A. 785, 70 Pac. 531); *Burrows, Negligence*, § 45; *Brown v. Oregon Lum. Co.* 24

Or. 317 (33 Pac. 557); *Stager v. Troy Laundry Co.* 38 Or. 480 (53 L. R. A. 459, 63 Pac. 645); *Stone v. Oregon City Mfg. Co.* 4 Or. 52; *McGlyn v. Brodie*, 31 Cal. 376; *Johnson v. Oregon S. L. Ry. Co.* 23 Or. 9 (31 Pac. 283); *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888).

(3) A master may conduct his business in a manner most agreeable to himself, using either old or new appliances; and an employé who has knowledge of the character of the appliances furnished him by the master, and is injured in their use, cannot recover: *Duntley v. Inman*, 42 Or. 334 (59 L. R. A. 785, 70 Pac. 529-531); *Quigley v. Levering*, 167 N. Y. 58 (60 N. E. 276); *Brown v. Oregon Lum. Co.* 24 Or. 319 (33 Pac. 557); *Stone v. Oregon City Mfg. Co.* 4 Or. 52; *Gibson v. Oregon S. L. Ry. Co.* 23 Or. 493 (32 Pac. 295).

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The first and third defenses set up in the answer may be eliminated from the discussion, as they are not supported by the testimony. The only questions for our consideration are (1) whether there was any evidence from which the jury could have found that defendant was negligent in using a defective or unsafe rope; and (2) if so, whether the risk incident thereto was assumed by the plaintiff.

The principles of law by which these questions are to be determined are too well established to require anything more than a mere statement. It is the duty of a master to exercise reasonable care to furnish his servant with a reasonably safe place in which to work, and reasonably safe appliances and instrumentalities to work with, and to keep them in that condition. For a failure in either of these respects he is liable to an injured servant who is himself free from negligence, unless the defects are known

to or plainly observable by him: *Miller v. Inman*, 40 Or. 161, 165 (66 Pac. 713). In an action by a servant against his master to recover damages for an injury, the burden of proof is on the plaintiff to show the negligence charged, and the mere happening of the accident is ordinarily not sufficient: *Duntley v. Inman*, 42 Or. 334 (70 Pac. 529). But it is not necessary that there should be positive proof of negligence. It, like any other fact, may be inferred from the circumstances. There may be, and are, cases in which the master's negligence is clearly inferable, although there is no positive proof thereof. The rule is that if two inferences may be legitimately drawn from the facts in evidence, one favorable and the other unfavorable to the defendant, a question is presented which calls for the opinion of the jury. If, however, there is no proof of any fact by which the defendant's conduct may be ascertained, there is nothing for the jury. The mere proof of an accident, therefore, ordinarily raises no presumption of negligence; but, where it is accompanied by proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case cannot be determined by the court as a matter of law, but must be submitted to the jury.

1. Now in this case certain facts, independent of mere proof of the accident, stand out clearly from the testimony. The defendant was personally directing the work, and had actual knowledge of the size and condition of the rope in use, or was chargeable therewith. The same rope had been used by him in lowering all the other braces, and had therefore been subjected to a heavy strain. In lowering each brace, a turn of the rope was taken around the cap, and the brace lowered by slacking it up. It was thus necessarily subjected to more or less friction each time a brace was lowered, by coming in contact with the sharp edges of the cap. As a consequence, it was manifestly not in as good condition at the time of the accident as at the

beginning of the work. The rope broke in ordinary use, and without being subjected to any unusual or extraordinary strain. In addition to all this, there was evidence tending to show that it was an old rope, and that it broke the day before when in use. All these circumstances tended to show that the rope was imperfect and unsuitable for the purposes to which it was applied, and we do not think it can be said, as a matter of law, that under such circumstances there is no question for the jury. In the Duntley Case, which seems to be relied upon by defendant, the injury was caused by the sudden breaking of an iron pulley. The testimony did not show any apparent cause for the breaking. The pulley had been purchased from and set up by a reputable manufacturer. It had been in constant and successful use for some time, and was admittedly suitable and proper for the use to which it was put. There was therefore nothing from which the negligence of the defendant could have been inferred, except the mere fact of the accident, and this the court held was insufficient. But here the sufficiency of the rope which broke is challenged. It was shown that the defendant had used it in a manner necessarily calculated to weaken and destroy its efficiency, that it had broken the day before, and that it was an old rope. Thus there was proof tending to show that the rope was defective and insufficient, aside from the mere happening of the accident, and the distinction between this and the Duntley Case is clear.

2. It is argued, however, that, even if the rope was defective and inadequate for the work, the plaintiff assumed the increased risk caused thereby by continuing in the defendant's service. The rule is well established that where an employé receives and uses a defective appliance he cannot recover for an injury resulting therefrom, if, with knowledge of the defect, he continues in its use without notice to his employer. There is no evidence in this case,

however, that the plaintiff knew the rope was defective or worn. He did not use it to any extent. He had not examined or noticed it particularly, nor was it his place to do so. It was the duty of the defendant to furnish reasonably safe appliances for the use of his servants, and the plaintiff had a right to assume that this duty had been discharged: *Johnston v. Oregon S. L. Ry. Co.* 23 Or. 94, 104 (31 Pac. 283); *Texas & Pac. Ry. v. Archibald*, 170 U. S. 665 (18 Sup. Ct. 777). Nor does his knowledge of the breaking of the rope the day before the accident alter the situation. He was not using it at the time, and did not know that the break was the result of a defect therein. Indeed, from what the defendant said at the time, and from his conduct, the plaintiff had a right to suppose that the breaking was caused by the carelessness of the man who was handling the rope. Moreover, he had a right to assume, even if the break had been caused by a defect, that the defendant had since substituted a suitable rope in its place. We do not think, therefore, under the testimony as it stands, that there was any ground for holding that the plaintiff assumed the increased risk caused by the use of a defective rope, if it was in fact defective. From these views it follows that the court was in error in sustaining the motion for a nonsuit, and the judgment must be reversed and the cause remanded for a new trial. REVERSED.

Decided 11 January, 1904.

STATE v. GRAY.

[74 Pac. 927.]

43	446
446	25
446	31

CRIMINAL LAW — ADMISSIBILITY OF DYING DECLARATIONS.*

1. It is not necessary that an injured person have expressed a belief in the near presence of death to render his statements competent as dying declarations, as his condition of mind may be quite apparent from his conduct. For instance,

*NOTE.—The question, What Declarations are Admissible as Dying Declarations, and in What Cases, is considered in an article in 86 Am. St. Rep. pp. 637-667; and Dying Declarations as Evidence is the subject of a note in 56 L. R. A. pp. 333-357.—REPORTER.

where a person who had been shot in an altercation was aware that his injuries were very severe, and had been informed by the attending surgeon that he necessarily had to die of his wounds, and that a statement by him would probably be serviceable in clearing up the matter, a corrected and signed written statement is competent evidence as a dying declaration, though the signer did not orally express his belief in impending death.

IMPEACHMENT OF WITNESS.

2. On cross-examination of a witness she was asked if, under given circumstances, she had not made a certain statement to a certain person, which she denied. The certain person, having been asked whether such statement had been made, answered "Yes, would answer part of that," but, after being required to answer explicitly, said "Yes." On cross-examination she explained the conversation, which differed materially from the version given by the first witness, yet contradicted it in some respects. *Held*, that the impeaching testimony was competent.

UNDERSTANDING OF IMPEACHING QUESTION BY WITNESS.

3. An impeaching question is sufficient if it attracts the attention of witness to the particular statement or act about which he is being asked, and greater particularity than will accomplish this is not required.

SELF-DEFENSE†—REPELLING UNARMED ATTACK.

4. In repelling an unprovoked attack the party assailed may act upon the reasonable appearances of the situation, though the assailant may not have been armed. Sometimes an unarmed attack may justify a killing in self-defense.

†NOTE.—In 74 Am. St. Rep. pp. 717-740 is a carefully arranged and exhaustive note on The Law of Self-defense. See, also, note, Right of Self-defense, in 6 L. R. A. 424, and an extended discussion of the subject in 45 L. R. A. 687, under the title, Self-defense set up by Accused who Began the Conflict.—REPORTER.

From Union: ROBERT EAKIN, Judge.

Woodson Gray appeals from a conviction of manslaughter.
REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thos. H. Crawford* and *Mr. J. D. Slater*.

For the state there was a brief over the names of *Andrew M. Crawford*, Attorney General, and *Samuel White*, District Attorney, with an oral argument by *Mr. Crawford*.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendants Woodson and Wade Gray were jointly accused by indictment of the crime of murder in the first degree for killing one A. M. Hallgarth on March 20, 1903; and, being tried, the former was convicted of manslaughter, and the latter acquitted. This appeal is from the judgment following conviction.

On the morning of the day indicated, the defendants were passing Hallgarth's premises on foot upon the public highway, and, being hailed by the latter, who was in his field, south of the road, halted for him to come up. As he approached, a conversation sprung up relative to some difficulty with Gray's children at school, which became animated and heated; and Hallgarth, becoming angered and enraged, jumped over the fence into the road, removed his coat, and advanced toward the defendant Woodson Gray in a threatening attitude, expressing, as the evidence tends to show, his purpose of settling the difficulty then and there, when Gray drew his pistol with his left hand (being left-handed), and warned Hallgarth to desist, and that, if he did not, it would be at the peril of his getting hurt. Hallgarth paid no heed to the warning, but continued to advance upon Gray, cursing him, and threatening to take his gun from him and beat his brains out with it, and, when he came within reach, violently seized the gun, and attempted to wrench it from Gray's hand. A scuffle ensued, in the course of which four shots were fired; one of them taking effect upon Hallgarth, entered his body upon the right side two or three inches below the armpit, in the sixth interspace, ranging forward and downward, penetrating the lung, the right lobe of the liver, and a part of the bowel, and passing out through the tissues and muscles of the stomach. During the affray, and, when Gray was about to be overcome, he called upon his son to take his knife and defend him, whereupon the son assailed Hallgarth; inflicting six wounds upon his person, in the back and shoulder, some of them slight, others more severe, but none necessarily fatal.

Gray testified that as Hallgarth advanced upon him he backed off several steps, but that Hallgarth continued to advance, cursing and threatening to kill him, until he came within striking distance, when he jumped and struck

him on the left side of the head, knocking him down, grabbing for the gun at the same time; that, as defendant was falling, or as he struck the ground, he fired the first shot, and thereafter fired two or three others, but thought it was the first shot that took effect, and that Hallgarth wrenched the gun out of his hand, and attempted to shoot him with it, but, in the excitement, his finger was pulling on the guard instead of the trigger. Hallgarth stated that when he got close enough to Gray to grab his arm in the hand of which he held the revolver, but before getting hold of it, Gray shot him. He further stated that Gray fired two or three more shots at him in close succession before he was able to take the revolver from him; that he got him down by throwing him over, not by knocking him down; that he did not hit him at any time; and that while he had him down, securing the revolver, Gray called upon his son to take his knife and kill the declarant. Hallgarth made a statement to Dr. Whiting about 6 o'clock of the evening of the day of the altercation, which the latter reduced to writing, and the former signed after it had been read over to him several times. This statement was introduced by the State, and admitted in evidence, over the objection of defendant, as the dying declaration of Hallgarth; and the action of the court in that regard constitutes the first assignment of error.

1. Dr. Whiting testified that he attended Hallgarth in the morning and evening of the 20th, and again the next day in the morning, and that he died in the evening; that he found him in bed, in a condition of extreme collapse, and, after detailing the nature of the several wounds inflicted, stated that the direct cause of his death was the bullet wound; that the knife wounds contributed to the shock upon his system, but were not fatal, nor the proximate cause of death. He further testified that, before Hallgarth

made the statement (using the language of the witness), "I told him I thought he was going to die, that he necessarily had to die, and that probably a statement would be of some service in clearing up the matter in court; and he gave me that statement." The basis of the objection to the admission of his declarations is that they were not shown to have been made under a sense of impending death. It will be perceived that deceased made no express or direct statement indicating that he was conscious of the fatality of the injuries received, or of his near approach to dissolution; and all there is from which the state of his mind upon the subject may be inferred is the suggestion just related of his physician, made to him, his action in response thereto in making and signing the declarations, and the circumstances and conditions leading up to them. Was this sufficient to justify their admission as evidence in the case? Two conditions must exist to render dying declarations admissible: (1) The declarant must have been *in extremis*; and (2) they must have been made in the conscious belief that death was impending, and without hope or expectation of recovery. The latter condition is purely one of the mind, and must be ascertained and determined by what was said and done in relation to the declarations, and by all the facts and circumstances leading up to and attending their utterance. It may be, and usually is, evidenced by verbal expressions of the declarant indicating with more or less directness his belief in the near and sure approach of dissolution; but it is not essential that he should have made any statement or given utterance in language expressive of his present frame of mind in that relation, for it may be inferred from his conduct and deportment, his apparent condition, involving the nature and extent of the wounds inflicted, being obviously such that he must have felt and known that he could not survive, and the communications made to him,

if any, especially by his medical advisers, if assented to or understandingly acquiesced in by him.

As was said by Mr. Justice BEAN in *State v. Fletcher*, 24 Or. 295, 297 (33 Pac. 575, 576): "It is not necessary to prove the existence of such belief by any express statements of the deceased, but it may be inferred from all the circumstances." And, quoting from Greenleaf on Evidence (volume 1, § 158), he continues: "It is enough if it satisfactorily appear in any mode that they were made under that sanction, whether it be directly proven by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." See, also, *People v. Simpson*, 48 Mich. 474, (12 N. W. 662); *Peoples v. Commonwealth*, 87 Ky. 487 (9 S. W. 509, 810). *Regina v. Perkins*, 9 C. & P. 395, is a case very near to this. The declarant was mortally wounded by a gunshot on one day, and died the next. In the evening of the day he received the injury, he was told by the attending physicians that in all probability he would not recover—that the effects of the injury would most likely kill him—to which he made no reply, either expressing assent or dissent, but appeared distressed and dejected; and it was held that a statement made by him at the time was admissible. So, also, is *Mattox v. United States*, 146 U. S. 140 (13 Sup. Ct. 50). The person injured asked the opinion of the attending physician as to the probability of his recovery, who made reply that the chances were all against him, and that he did not think there was any show for him at all; and, without other indication of the state of his mind upon the subject, he made the declarations or statement objected to, and it was held competent to go to the jury. Other cases of marked analogy are *Westbrook v. People*, 126 Ill. 81 (18

N. E. 304); *Commonwealth v. Matthews*, 89 Ky. 287 (12 S. W. 333). In the case at bar the injuries of Hallgarth were very grave, of which he was unquestionably fully aware; and, on being informed by Dr. Whiting that he necessarily had to die, and that a statement from him would probably be of some service in clearing up the matter in the court, he responded by making it. Evidence of his sense of impending dissolution, without hope of surviving his inflictions, could scarcely be made stronger by a direct affirmation by him to that effect. The statement was properly admitted.

2. The next question relates to the withdrawal from the jury by the court of certain testimony given by Mrs. Wade, intended for the impeachment of Mrs. Hallgarth, a witness for the State. While Mrs. Hallgarth was under cross-examination, she was asked if she had not made a certain statement to Mrs. Wade, recalling it, with the circumstances of time, place, and persons present, which she denied. Mrs. Wade, on being asked whether or nor she made such a statement to her, answered, "Yes, would answer part of that; don't know hardly—" but, when she was told that she must answer either "Yes" or "No," answered "Yes." On cross-examination, however, she gave her version of the statement, differing materially in some respects from that related to Mrs. Hallgarth and repeated to witness, but in other respects corresponding thereto, and tending in some manner to her impeachment. If Mrs. Wade had answered "No," that would have been the end of the inquiry; but, having answered "Yes," which would have been a positive contradiction of Mrs. Hallgarth, the defendant had a right to cross-examine her as to her recollection of the conversation. In this manner it was developed that there was a disagreement between her understanding of the conversation and that of counsel who propounded the impeaching question, which had a tendency to modify the extent of the contradiction, but not eliminate it entirely

or in all material respects; and hence we are of the opinion that the defendant was entitled to have the testimony of the witness upon the subject go to the jury.

3. For the purpose of laying a foundation for the further impeachment of Mrs. Hallgarth, she was asked on cross-examination if she did not make a certain statement to E. B. Moorelock, the witness and she "being alone present;" the examiner designating also the other circumstances of time and place. She remembered distinctly seeing Mr. Moorelock at the time and place designated, but denied absolutely that she made the statement attributed to her. Moorelock, being placed on the witness stand, recalled the conversation alluded to, but stated that other persons were present, to wit, Mrs. Hallgarth's daughter and Mrs. Hazewood; and for this difference from that indicated by the question propounded to Mrs. Hallgarth as to the persons present, if we are rightly informed, the court would not permit him to answer as to whether such a conversation took place or not. This we think was error. It is the purpose of the statute (B. & C. Comp. § 853), in requiring the supposed inconsistent statement to be related to the witness whom it is desired to impeach, with the circumstances of time, place, and persons present, to call such especial attention to it that the witness may not mistake the one in the mind of the examiner, and to which reference is had; and, when this is done, it is sufficient: *Sheppard v. Yocum*, 10 Or. 402; *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199); *State v. Bartmess*, 33 Or. 110 (54 Pac. 167); *State v. Deal*, 41 Or. 437 (70 Pac. 532). It appears from the record that Mrs. Hallgarth readily understood from the especial circumstances related to her when the conversation should have taken place, if at all, and was enabled to answer intelligently at once upon the subject, so that the purpose of the statute had been fully subserved.

4. The next assignment of error relates to an instruction given and another refused by the court. That given is in language as follows :

"But such right of self-defense as will justify the taking of life of the assailant can only be exercised to defend his life or defend his person from great bodily harm. But danger of a battery alone will not be sufficient to justify the taking of the life of his assailant."

The one refused is as follows: "It is not necessary that the assault made by the deceased at the time upon the defendant Woodson Gray, if you find that an assault was made, should have been made with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant Woodson Gray, is sufficient to justify the killing in self-defense, if the defendant Woodson Gray, at the time he shot and killed the deceased, had reason to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased."

There was evidence tending to show that the deceased was a blacksmith by trade, in the prime of life, weighing from 180 to 190 pounds, and a vigorous and powerful man ; while the defendant Woodson Gray, although a large man also, was fifty-seven years of age and impaired in health. We are impressed that the instruction requested, under all the facts and circumstances developed by the testimony, was a fitting and suitable complement to the one given. We have carefully examined all the other instructions given, and they contain none which is the equivalent of the one refused. A mere assault, or the danger of a battery alone, without any real or apparent danger to life or limb, or the infliction of great bodily harm, will not, it is true, justify the taking of human life. In such a case the assailed may withstand the attack and meet force with force, but not kill his assailant. The law does not require that he, being in a place where he has a lawful right to be,

and not being himself the aggressor, shall retreat to the wall, but it is his duty to retreat or otherwise avoid further conflict if he can reasonably do so without danger to his life or subjecting himself to great bodily harm, rather than take the life of his aggressor; that is to say, retreat or avoidance of further conflict to prevent the taking of human life is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent. Where, however, the assault is attended with such demonstration, and the present ability to execute it, whether the assailant is armed with a deadly weapon or not, as to indicate to the assailed, acting reasonably upon appearances, that he is in imminent danger of being beaten and maltreated, and probably disfigured or maimed, or his life imperiled, he has a right to withstand the assault, even to the taking of the life of the aggressor.

No person has a right to advance into a public highway and administer a merciless castigation upon his neighbor who is lawfully there; nor does the law require that a person, when so assailed, shall stop to inquire to what extremes his aggressor will push the attack, but may act at once upon appearances, and resist it with such force as will effectually repel it. A strong, powerful man, with his fists alone is capable of visiting great physical injury upon his victim much his inferior in strength or endurance, and he may even thus take his life. Instances are not wanting where such results have followed. An assault by a weaker person upon a stronger with the fists, without the physical ability presently apparent to do great injury, could not, it must be conceded, justify the taking of life, and the question as to the degree of danger attending the assault is one for the jury; they putting themselves in the place of the assailed, and acting as reasonable men upon the conditions as they appear to have existed. The present was manifestly a proper case to be submitted to the

jury upon the question of the relative strength and physical ability of the two combatants, and as to whether the defendant, at the time he fired at the deceased, acting from the standpoint of a reasonable man, had reason to believe that he was in imminent peril of great bodily harm or of losing his life. If such was the case, then he was justifiable in doing what he did to prevent the injury to himself. In support of this statement of the law, see *State v. Gibson*, 43 Or. 184 (73 Pac. 333); *State v. Benham*, 23 Iowa, 154 (92 Am. Dec. 416); *High v. State*, 26 Tex. App. 545 (10 S. W. 238, 8 Am. St. Rep. 488); *Commonwealth v. Drum*, 58 Pa. 9; *State v. Sumner*, 55 S. C. 32 (32 S. E. 771, 74 Am. St. Rep. 707, with note at p. 725 *et seq.*); *Davis v. State*, 152 Ind. 34 (51 N. E. 928, 71 Am. St. Rep. 322).

The judgment of the circuit court will therefore be reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

REVERSED.

Decided 6 July, rehearing denied 3 August, 1908.

BERGMAN v. INMAN.

[72 Pac. 1086, 73 Pac. 341.]

RIGHTS OF PURCHASERS PENDENTE LITE—JUDGMENT OF SISTER STATE.

1. Purchasers of real or personal property pending litigation over the title thereto, or the existence of a lien thereon, take subject to such final order as may be entered concerning it. As an illustration: During the pendency of a suit in a sister state to enforce a lien claimed on certain logs, part of them were removed by defendant from that jurisdiction and brought into this state. In due time a decree was rendered establishing such lien, but the lien claimant could not enforce his decree, the logs being gone. Subsequently claimant began this action against the defendant in this state for damages caused by removing the logs, under a statute of the sister state providing for such an action against any one destroying or rendering difficult the identification of logs covered by a lien, and the decree establishing the lien is competent evidence for plaintiff, as it tends to show that the logs were subject to a lien when taken.

ENFORCING LIABILITY INCURRED IN SISTER STATE—COMITY.

2. A right of action accrued in one state, whether statutory or otherwise, may be enforced in any court of another state having jurisdiction of the subject-matter and of the parties, the cause of action originally not being contrary to justice or morals, or against the public policy of the forum.

LIMITATION ON CAUSES OF ACTION ARISING IN SISTER STATE.

3. Rights of action must of necessity accrue when and where the acts creating the right occur, and particularly is this true of rights created by statute, which of

course have no extraterritorial effect. For instance: A right of action created by a statute of the State of Washington accrues when the occurrence giving rise to it takes place in that state, and not when a similar occurrence takes place in another state, for the latter event naturally does not violate any law of Washington, since it does not happen there.

ESTOPPEL TO CHOOSE REMEDIES.

4. One having a logger's lien under a statute of a foreign state is not estopped from pursuing the action for damages conferred by such statute on any one destroying or rendering uncertain the identification of the property covered, by the fact that, though knowing that the owner's assignee had taken possession of the logs and removed them from that state, he nevertheless failed to enforce his lien in the jurisdiction whither the property had been taken; for he had his choice of a lien suit or a damage action, and the right to prefer was his.

AVAILABILITY OF PARTIAL DEFENSE PLEADED AS A COMPLETE DEFENSE.

5. A partial defense pleaded to an entire cause of action, while demurrable, may be used, if not demurred to, so far as it may prove applicable to the facts.

From Multnomah: MELVIN C. GEORGE, Judge.

Action by C. O. Bergman against Inman, Poulsen & Co., a corporation, and Matti Makarainen, to recover damages for taking and converting certain logs on which plaintiff and his assignors had liens. The action is to enforce a right given by Section 1694, Hill's Ann. Stat. & Codes, Wash., the body of which is set out in the opinion. Plaintiff recovered a judgment, and defendant corporation appeals.

REVERSED.

For appellant there was a brief over the name of *Cake & Cake*, with an oral argument by *Mr. Harry M. Cake*.

For respondent there was a brief over the names of *Reynolds & Stewart* and *Milton W. Smith*, with an oral argument by *Mr. David Stewart* and *Mr. Smith*.

MR. JUSTICE BEAN delivered the opinion.

Under the statute of the State of Washington, every person performing labor upon or assisting in obtaining or securing saw logs has a lien thereon for such work or labor, and "any person who shall injure, impair, or destroy, or who shall render difficult, uncertain, or impossible of identification," any saw logs upon which there is a lien, "without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the

amount secured by his lien, which may be recovered by a civil action against such person": Hill's Ann. Stat. & Codes, Wash. § 1694. The plaintiff and various other persons performed work and labor for one Makarainen, in that state, at divers times between the 1st of May and the 29th of September, 1892, in obtaining and securing some five million feet of saw logs. On October 1, 1892, they each filed a claim of lien with the auditor of the proper county, as required by law. On the 27th of the same month, plaintiff, to whom the other lienholders had duly assigned and transferred their claims, commenced an action in the superior court of Lewis County against Makarainen to foreclose these various liens. On March 9, 1893, a final judgment was rendered in his favor and against Makarainen for \$2,858.75, decreeing a foreclosure of the liens, and that the logs therein described, amounting to about four million feet, should be sold to satisfy the judgment. The logs were in the State of Washington when the action was begun, but while it was still pending the defendant, under an alleged purchase from Makarainen, took possession of and brought into this state about one and one half million feet thereof, which some months later were sawed and converted into lumber at its mill in Portland. After the defendant had taken possession of and removed the logs into this state, Makarainen assigned and transferred his account therefor to Fleckenstein & Mayer, who, on the 26th of April, 1893, commenced an action against the defendant to recover the contract price thereof. Such action resulted in a judgment in their favor for the amount found due and owing thereon, which judgment, it is alleged, has been fully paid and satisfied. On the 26th of January, 1899, this action was brought against the defendant to recover the damages alleged to have been sustained by plaintiff on account of its violation of the statute of Washington in removing the logs from that state and rendering them impossible of identi-

fication, without the consent of the plaintiff lienholder. The several provisions of the statute of Washington with reference to loggers' liens and the methods of procedure thereunder are set out in full in the complaint. The verdict and judgment being in favor of plaintiff, the defendant appeals, assigning as error (1) the admission in evidence of the judgment roll in the action brought by the plaintiff against Makarainen in the superior court of Lewis County, Washington, to foreclose the loggers' liens against the property in controversy; (2) the refusal of the trial court to instruct the jury that the statute of limitations is a bar to the cause of action for all logs taken by the defendant in the State of Washington and removed into this state prior to January 27, 1893; and (3) in refusing to charge that, if the plaintiff permitted defendant, after taking the logs from the boom in Washington, to saw them into lumber, or if the defendant held them after such taking a sufficient length of time to permit the plaintiff to protect his rights by a foreclosure of his lien, he cannot recover.

1. It is urged that the judgment roll was not admissible in evidence, because the defendant was not a party to that action, and because the logs were removed from the State of Washington prior to the rendition of the judgment. As already stated, the defendant took possession of the logs under an alleged purchase from Makarainen in Washington, after the commencement of the action in that state to foreclose the liens thereon; and it is common learning that a purchaser of real or personal property pending litigation concerning the title or the validity of a lien thereon takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of the court: *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537); *Houston v. Timmerman*, 17 Or. 499 (21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848); 2 Black, Judgm. (2 ed.) § 550; *Richardson v. Petersen*, 58 Iowa, 724 (13 N. W. 63); *Diamond v. Lawrence*

County, 37 Pa. 353 (78 Am. Dec. 429); *Fletcher v. Ferrel*, 9 Dana, 372 (35 Am. Dec. 143); *McCutchen v. Miller*, 31 Miss. 65, 88. The defendant's counsel do not seriously controvert this rule, but seek to make a distinction between an action of tort to recover damages for a violation of the Washington statute and a suit to foreclose plaintiff's lien on the logs. It is admitted, if we understand correctly, that in a suit to foreclose the plaintiff's lien in this state the decree of the Washington court would be conclusive, because the proceeding in that state was *quasi in rem*; but, since this is an action in tort, to recover damages for destroying the identity of the property to which the lien attached, the judgment can have no such effect. An essential element in this case, and one necessary for the plaintiff to establish, was the existence of his lien at the time the logs were taken from the State of Washington by the defendant. The defendant purchased and took possession of the property subject to the lien in favor of the plaintiff during the pendency of the foreclosure suit, and is, therefore, bound by the decree therein, so far as it determined the existence of the lien. "The law is," says the Supreme Court of the United States, "that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset": *Tilton v. Cofield*, 93 U. S. 163, 168. It can make no difference in this respect whether the action here is to foreclose the lien or to recover damages under the statute for destroying the identity of the property covered by it. It was incumbent upon the plaintiff to prove the existence of the lien at the time the property was taken by the defendant, and the judgment rendered in Washington was competent evidence for that purpose. Nor did the removal of the property from that state prior to its rendition render it incompetent. The decree estab-

lished the fact that at the time the property was removed by the defendant the plaintiff had a lien thereon. As the property was removed from the state prior to its rendition, the decree could not fix a lien thereon at its date, because the court did not have jurisdiction of the property (*North Pac. Lum. Co. v. Lang*, 28 Or. 246, 261, 42 Pac. 799, 52 Am. St. Rep. 780); but it judicially determined that there was a lien on it when it was removed, and that was sufficient in this action. This is not a suit to foreclose the lien, or to enforce the judgment of the Washington court. It is an independent action on a liability created by a statute of that state, based upon the contention that the defendant removed property upon which plaintiff had a valid lien, and destroyed its identity. The question as to what property was affected by the decree and ordered sold to satisfy the plaintiff's judgment is therefore immaterial.

2. The evidence tended to show that a portion of the logs in controversy was taken by the defendant from the State of Washington and brought into this state prior to the 27th day of January, 1893, more than six years before the commencement of the present action. The defendant requested the court to instruct the jury that the action was barred by the statute of limitations as to all logs taken by the defendant prior to the date mentioned. This is an action for tort, alleged to have been committed in the State of Washington, and not for one committed in this state. Where a right of action has become fixed and a legal liability incurred in one state, that liability may be enforced in any court of another state that has jurisdiction of such matters and can obtain jurisdiction of the parties, if the alleged cause of action is not contrary to the public policy of the state where the action is brought, nor against justice or good morals: *Aldrich v. Anchor Coal Co.* 24 Or. 32, 38 (32 Pac. 756, 41 Am. St. Rep. 831); *North Pac. Lum. Co. v. Lang*, 28 Or. 246 (52 Am. St. Rep. 780, 42 Pac. 799);

Dennick v. Railroad Co. 103 U. S. 11, 18. This is on the principle of comity, and because the right of action is entitled to recognition everywhere.

3. But it necessarily follows from this principle that such right must have accrued in the state where it is alleged to have arisen. The action cannot be grounded upon acts done in the state where it is commenced. The law of the place where the right was acquired or the liability incurred will govern as to the right of action. All that pertains merely to the remedy will be controlled by the law of the state where the action is brought: *Herrick v. Minneapolis & St. L. Ry. Co.* 31 Minn. 11 (16 N. W. 413, 47 Am. Rep. 771). Now, as this is an action to enforce in the courts of this state a liability created by a Washington statute, the right of action, if it exists at all, must have accrued in that state. No cause of action can arise here for a violation of a Washington statute, as it has no extra-territorial effect; and no act committed here can give rise to such a cause of action, since it cannot be a violation of such a statute. The cause of action sought to be enforced must, therefore, have accrued when the logs were taken from the State of Washington by the defendant, and the plaintiff's argument is not sound that it did not accrue until five or six months later, when the logs were sawed into lumber at its mill in Portland. The instruction, therefore, that the action is barred as to all logs taken from the State of Washington by the defendant more than six years prior to the commencement of the present action is sound law, and should have been given.

4. There is, so far as we can understand the record, no merit in the contention of the defendant that the plaintiff has by his conduct waived his right of action against it for a violation of the Washington statute, or that he is estopped from prosecuting such action. The fact that he knew defendant had taken possession of the logs and re-

moved them into this state, and did not commence some proceeding to enforce his lien thereon, could not operate as an estoppel against the prosecution of an action for the tort. He was entitled under the statute to proceed against the defendant to recover such damages, if any, as he may have sustained by reason of its taking and removing the logs into this state and converting them into lumber, independent of his right to foreclose his lien thereon. He had a choice of remedies, and the defendant cannot complain because he chose one rather than the other.

It follows, however, from the views hereinbefore expressed, that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

Counsel for plaintiff, in their petition for a rehearing, insist for the first time that the instruction relating to the statute of limitations, for the refusal to give which the judgment was reversed, is erroneous, and was properly refused, because it assumed as established facts which were disputed. They presented no such question at the argument or in their briefs, although an issue thereon was tendered by the appellant in its brief. We therefore very naturally assumed, as we were clearly justifiable in doing, that the instruction was proper, and should have been given, unless plaintiff's contention was sound that the right of action "accrued when the logs were cut up by the appellant in this case, rendering them impossible of identification, alleged in the complaint to be about May 10, 1893, but the proofs show they were cut up in June, 1893." Ordinarily we should be disposed to let the question rest here. However, in order to avoid the possibility of injury to the plaintiff, we have again examined the record, from which

it clearly appears that there is no ground in fact for the criticism of the instruction. The bill of exceptions recites that "all the testimony showing the various quantities and dates" of the removal of the logs from the State of Washington by the defendant is contained therein. The logs were removed from the boom of the Cowlitz & Columbia River Boom Company. One Banks was an employé of the boom company during the time, and scaled the logs. He testified that he saw them in the raft of the defendant at the time, and "scaled them there." He made a memorandum at the time of the date and the quantity of logs scaled in each raft, and testified in detail concerning that matter at the trial. He said the logs were taken from the boom, but he did not know when or by whom. Mr. Poulsen, one of the officers of the defendant corporation, testified, however, that "we took them [the logs] away as quick as they were rafted," and "they were taken away as they were rafted; they were taken away at that time." Mr. Dodd, who was the president of the boom company, testified that "they [the logs] were delivered as they were rafted, during January, February, and March, 1893." All this testimony stands uncontradicted, and it appears therefrom that Banks scaled the logs after they were put in the raft of the defendant company, and that it took them away as soon as they were scaled. Under the testimony given, therefore, there was no error in the instructions assuming as an established fact that a certain definite quantity of logs was taken by the defendant from the State of Washington after January 23, 1893.

5. Nor is there any merit in the point made in the petition, also for the first time, that the defense of the statute of limitations is insufficient because it only applies to a portion of the logs taken. There is an old rule of the common law that, if a defense is set up as an answer to the whole cause of action, while it is in fact only a partial de-

fense, it will be held bad on demurrer, although it would be admissible as a partial defense if properly pleaded: Pomeroy, Code Rem. (3 ed.) § 608. In this case, however, the complaint sets up but one cause of action, alleged to have accrued on or about the 10th day of March, 1893. The plea of the statute of limitations was interposed as a defense to this cause of action. If it appeared upon the trial that a portion of the logs was taken more than six years prior to the commencement of the action, the defendant is entitled to the benefit of such defense, so far as it is applicable to the facts.

The petition for rehearing is denied.

REHEARING DENIED.

Decided 5 October, rehearing denied 31 October, 1903.

EATON v. MIMNAUGH.

[73 Pac. 754.]

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COUNTIES — CONSTITUTIONAL PROHIBITION AGAINST INDEBTEDNESS.

1. A debt incurred for the construction of a courthouse is one voluntarily incurred, within the prohibition of Const. Or. Art. XI, § 10, providing that no county shall create any debts or liabilities exceeding \$5,000, except for certain purposes. This section does not prohibit the creation of debts in the performance of some imperative public duty, but providing a courthouse is not such, for it may be postponed in the discretion of the county authorities.

COUNTY INDEBTEDNESS—CONFLICT BETWEEN CONSTITUTION AND STATUTE.

2. A legislative direction to violate a constitutional prohibition is void. For instance, the act of the legislature directing that an election be held to select a county seat of Union County, and, in case of the selection of another than the present place, that the county officers provide \$45,000 by an issue of warrants for the construction of a new courthouse (Laws 1903, p. 104), is void, the county being already in debt beyond the limit permitted by the state constitution: *Stimon v. Northup*, 27 Or. 487, distinguished.

STATUTE — CREATION OF COUNTY INDEBTEDNESS.

3. An act requiring an election to be held for the selection of a county seat, and directing the county clerk to issue warrants to pay the cost of constructing a new courthouse, if a new location shall be selected, and to levy a tax each year for five years to pay off such warrants, does not limit the liability on such warrants to the proceeds of the levy (Laws 1903, p. 104), nor is it a legislative creation of a legal liability which must be recognized, like the expense of holding the sessions of the courts, or the payment of statutory salaries, but is a direction to the county officials to create a county debt for a purpose other than to suppress insurrection or repel invasion, within the prohibition of Const. Or. Art. XI, § 10.

From Union: ALFRED F. SEARS, JR., Judge.

Suit by A. E. Eaton and others against J. H. Mimnaugh, County Clerk of Union County, to restrain the latter from giving notice of a special election for the relocation of the county seat of Union County, and incurring the necessary expense incident thereto. A demurrer to the complaint was sustained, and from the resulting decree plaintiffs appeal.

REVERSED.

For appellants there was a brief over the names of *Crawford & Crawford* and *C. E. Cochran*, with an oral argument by *Mr. Thos. H. Crawford* and *Mr. Cochran*.

For respondent there was a brief over the names of *Samuel White*, District Attorney, *Chas. H. Finn*, and *William W. Cotton*, with an oral argument by *Mr. Finn* and *Mr. Cotton*.

MR. JUSTICE BEAN delivered the opinion.

This suit involves the constitutionality of an act of the legislature of 1903 for the relocation of the county seat of Union County (Laws 1903, p. 104), declaring that a special election shall be held on the first Monday in November, 1903, for the purpose stated, defining the duties of the county clerk in connection with such election, and prescribing the qualifications of voters thereat, and the manner of conducting the same. It is also provided that no place shall be voted for except the cities of Union and La Grande; that, if La Grande shall receive 55 per cent of all the votes cast, it shall be the county seat of the county from and after the 1st day of January, 1905, otherwise the county seat shall remain at Union, its present location; that in the event La Grande shall receive the requisite number of votes, and be selected as the county seat, the county court shall, within sixty days after the election, acquire in La Grande, by purchase or otherwise, a suitable site for a courthouse, and within ninety days adopt plans and specifications for such a building, to be constructed of brick,

wood, and iron, with the necessary fireproof vaults for the county records; that as soon as convenient after the adoption of the plans and specifications the county court shall let a contract to the lowest responsible bidder for the construction of the building, to cost the county, together with the site, not to exceed \$45,000, and to be completed and ready for occupancy by January 1, 1905, at which time the county records and offices shall be moved from the courthouse at Union to the new courthouse at La Grande; that in payment for the proposed courthouse the county clerk shall issue warrants on bills duly audited and approved by the county court on the "courthouse fund"; that the county court shall levy a tax on all the taxable property within the county "each year for five years sufficient to raise a fund that will pay at least one fifth of said warrants, principal and interest, each year, so that the whole thereof shall be paid at the end of five years"; that if for any reason the contemplated courthouse shall not be completed and ready for occupancy by January 1, 1905, it shall be the duty of the county court, in case of a change in the county seat, to provide suitable offices and quarters at La Grande for the county officers and courts until the courthouse is completed and ready for occupancy.

The plaintiffs, who are residents and taxpayers of the county, bring this suit to restrain the clerk from giving notice of and providing necessary supplies for such special election, or incurring any expenses on account thereof, on the ground that the county is indebted in the sum of \$200,000, contracted since the constitution took effect, evidenced by outstanding warrants, more than \$5,000 of which was voluntarily incurred, and it is therefore incapable of complying with the provisions of the act in question in case the county seat should be changed from Union to La Grande, because of the constitutional provision that "no county shall create any debts or liabilities which shall

singly or in the aggregate exceed the sum of \$5,000, except to suppress insurrection or repel invasion": Const. Or. Art. XI, § 10. The plaintiffs insist that the act is entire, and that, if the portion thereof making it the duty of the county court to construct a courthouse at La Grande in the event of the location of the county seat at that city is void, because in violation of the constitution, the entire act must fail. This position is not questioned by counsel for defendant, and we shall assume it to be sound. The argument in support of the constitutionality and validity of the statute under consideration, as we understand it, is: (1) The provision of the constitution directed against the creation of debts by a county, invoked by plaintiffs, has no application to a debt incurred for the construction of a courthouse, because it is an obligation which a county is compelled to assume as a governmental agent; (2) the constitutional limitation applies to counties only, and does not prohibit the legislature from imposing liabilities upon them to any extent or for any legitimate purpose, or from compelling them to create such liabilities; (3) the act in question does not contemplate the creation of any debt against the county.

The constitutions of most of the western states contain provisions restricting within certain limits the right of a county to incur indebtedness, and wherever they have been brought in question the general tendency of the courts has been to give them force and effect, and to construe them so as to protect the taxpayers against the unauthorized expenditures. In many of the states the provisions are that no county "shall be allowed to become indebted," or "shall become indebted," exceeding a certain amount, or "shall be authorized or permitted to become indebted" beyond a certain sum, or that "the aggregate debts for all purposes" shall not exceed a certain amount. In all such states the decisions are uniform in holding that any liability, not

arising from a tort, by virtue of which the county is under obligation to pay money, is within the prohibition of the constitution, and void if in violation thereof, without regard to the purpose for which it may have been incurred or contracted. A distinction was at one time made by the Supreme Court of Missouri between debts voluntarily incurred by a county, such as for the improvement of the courthouse, and those the law required it to incur, as for the board of prisoners; holding the former void (*Book v. Earl*, 87 Mo. 246), and the latter valid: *Potter v. Douglas County*, 87 Mo. 239. But the attempted distinction was subsequently repudiated, and the doctrine broadly announced that the provisions of the constitution of that state prohibiting a county from incurring indebtedness "exceeding in any year the income and revenue provided for such year" included all indebtedness for any purpose: *Barnard v. Knox County*, 105 Mo. 382 (16 S. W. 917, 13 L. R. A. 244).

The Constitution of Colorado provides that the aggregate debts of any county, for all purposes, exclusive of debts contracted before the adoption of the constitution, shall not at any time exceed a certain per cent of the assessed values, unless the taxpayers vote in favor of such excess at some general election. One of the counties of the state issued warrants in excess of the constitutional limit for the ordinary expenses of the county, such as witness and juror fees, election costs, charges for board of prisoners, county treasurer's commission, etc., and afterward refused to pay them. In an action brought in the federal courts on the warrants it was insisted that they were not within the provisions of the constitution, because issued in payment of involuntary or compulsory obligations of the county, which it could not avoid. The difficulty, if not impossibility, of maintaining county organizations under any other construction of the constitution,

was especially urged, and seems to have been persuasive in the court of primary jurisdiction. Upon appeal, however, the Supreme Court of the United States held the warrants absolutely void, on the ground that the language of the constitution plainly included all indebtedness of whatsoever kind and for whatever purpose it may have been incurred, and the hardship imposed on individuals or the county afforded no excuse for the violation of its provisions; that there was no difference between indebtedness incurred by the contract of the county and that arising from what may be called "compulsory obligations." "Neither can we assent to the position of the court below," says Mr. Justice LAMAR, "that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question. There is no necessary inability to give both of the provisions their exact and literal fulfillment": *Lake County v. Rollins*, 130 U. S. 662 (9 Supt. Ct. 651).

Such are also the decisions under similar constitutional provisions of the courts of Illinois (*City of Springfield v. Edwards*, 84 Ill. 626; *City of Bloomington v. Perdue*, 99 Ill. 329; *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781); Indiana (*Sackett v. City of New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *City of Laporte v. Gamewell Fire Alarm Tel. Co.* 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359); Kentucky (*Beard v. City of Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222); Wyo-

ming (*Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926); Iowa (*Windsor v. City of Des Moines*, 110 Iowa, 175, 81 N.W. 476, 80 Am. St. Rep. 280); Montana (*State v. City of Helena*, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336, 81 Am. St. Rep. 453); Pennsylvania (*Keller v. Scranton*, 200 Pa. St. 130, 49 Atl. 781, 86 Am. St. Rep. 708); and Colorado: *People v. May*, 9 Colo. 80 (10 Pac. 641). The constitution of this state differs in language (although it is doubtful whether it does in substance) from that of the states referred to, and it may, therefore, be said that the authorities cited are not in point. They are illustrative, however, of the disposition of the courts not to extend the terms of the constitution by construction beyond its evident and plain meaning. In this view they afford material aid in construing our constitution, and are alluded to for that purpose.

The constitution of this state, as well as those of California and Washington, does not provide, as in many other states, that a county shall not "be allowed or permitted to become indebted" beyond a certain sum, but simply prohibits it from "creating" such an indebtedness. It has, therefore, been construed not to apply to involuntary indebtedness thrust upon the county by operation of law, such as fees of witnesses and jurors, salaries of officers, expenses of election, costs of conducting courts, and such other outlays as the law imposes upon the county, and which it is powerless to prevent or postpone: *Grant County v. Lake County*, 17 Or. 453 (21 Pac. 447); *Burnett v. Markley*, 23 Or. 436 (31 Pac. 1050); *Municipal Security Co. v. Baker County*, 33 Or. 338 (54 Pac. 174); *Lewis v. Widber*, 99 Cal. 412 (33 Pac. 1128); *Rauch v. Chapman*, 16 Wash. 568 (48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52); *Gladwin v. Ames*, 30 Wash. 608 (71 Pac. 189). It does, however, apply to debts incurred for the construction of county bridges, building of courthouses and jails, putting shelves in county

vaults, and the like, because voluntarily incurred: *Wormington v. Pierce*, 22 Or. 606 (30 Pac. 450); *Dorothy v. Pierce*, 27 Or. 373 (41 Pac. 668); *Municipal Security Co. v. Baker County*, 33 Or. 338 (54 Pac. 174). The county is for many purposes a mere governmental agency, charged with the performance of certain governmental duties, from the discharge of which it cannot escape, and any reasonable expense incurred by it in their performance may very properly be held as not within the prohibition of the constitution; but any obligation voluntarily assumed by it, if in excess of the constitutional limit, is void. It is difficult, if not impossible, to lay down any general rule whereby so to classify such obligations. Each case must be determined largely from its own facts, and by the doctrine of inclusion and exclusion. It manifestly cannot be held that all liabilities arising from the mere discharge of some public duty by a county, or in the performance of some powers conferred upon it by law, are involuntary obligations, and therefore not an indebtedness within the meaning of the constitution. A large part of the obligations incurred by every county may without any great impropriety be said to be involuntary, in the sense that the discharge of the duty in which they were incurred could not have been neglected or avoided without disregarding some provision of law; but, if that test alone is to be the standard, a county is practically left free to contract unlimited obligations, notwithstanding the provisions of the constitution. This would be violating the language of that instrument, and frittering away its meaning by construction.

1. In *Municipal Security Co. v. Baker County*, 33 Or. 338 (54 Pac. 174), Mr. Justice WOLVERTON, in referring to this question, says: "The expense incident to and necessary under the laws prescribed by the state to organize and maintain such a government [county] may be said to be thrust upon it by law but such as the county court, acting

in its capacity as fiscal agent of the county, has volition to contract, or such as may be wholly within its discretion to impose upon the county or not, as its judgment may dictate, is that against which the constitutional inhibition is directed." Generally speaking, it may be said that a liability imposed upon a county by law, which it is not at liberty to evade or postpone, is involuntary, and not within the terms of the constitution. But a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or temporarily until means are provided for the payment of the expenses incident thereto, cannot be so held. In no event, and under no possible construction of the constitution, does it seem that a debt incurred by a county for the building of a new courthouse can be said to be involuntarily incurred. It is the duty of a county to provide offices for its officers, and rooms and accommodations for holding its courts, jails for the confinement of prisoners, and the like. It is assumed, however, that this will be done within the current revenue. The county has authority to levy taxes annually upon all the taxable property within its limits, with which to raise revenue sufficient to pay its expenses (B. & C. Comp. § 3085); and the law and the constitution contemplate that it will exercise its powers in that respect. If, however, from some cause which could not reasonably have been foreseen or anticipated at the time of the annual levy, it is without sufficient accommodations for the purposes indicated, or means to provide the same, a reasonable indebtedness, temporarily incurred for that purpose, having due regard to the financial condition of the county and its taxable property, might probably be said to be involuntary. When, however, it is already provided with ample accommodations, the provisions of the constitution cannot be avoided by a mere change of the county seat. We are

clear, therefore, that under the constitution and facts of this case Union County cannot legally create an indebtedness for the building of a new courthouse.

2. Nor do we think the legislature has authority to compel it to do so. The argument is that the constitution prohibits the county, but not the legislature, from creating the debt; that, while a county cannot of itself create any debt in excess of the constitutional limit, the legislature may create a liability for any legitimate governmental purpose, and impose its payment upon the county, regardless of the constitution. The consequences of such a doctrine, and the facility it would afford for evading the wholesome provisions of the constitution, are such as to cause a court to weigh well the arguments in its favor, and to hesitate long before adopting it. Under such a construction, the constitution would afford but little protection to taxpayers. To rid itself of the undesirable restraint, it would only be necessary for the county to secure the enactment of a law imposing debts upon it for the construction of expensive jails, courthouses, highways, or other public improvements, regardless of its financial condition or the wishes of its people; or, if the county authorities were unwilling to incur such indebtedness, designing persons might secure such legislation. But, even if such doctrine be accepted as sound, it could not avail the defendant, for by the act under consideration the legislature did not create a liability which it required the county to discharge. It directed and commanded the county to create the indebtedness, and this it had no authority to do. The constitution says that no county shall create any debt in excess of a certain sum, and the constitution, of course, must be obeyed in preference to a statute which says it shall do so: *Buchanan v. Litchfield*, 102 U. S. 278; *Cook County v. Chicago Indus. School*, 18 N. E. 183 (1 L. R. A. 437, 8 Am. St. Rep. 386); *McRae v. County of Cochise* (Ariz.), 44 Pac. 299. The situa-

tion, as we view it, is this : Union County is now indebted beyond the constitutional limit. The constitution says that any additional indebtedness voluntarily incurred by it shall be invalid, and of no effect. The legislature requires it, in a certain event, to incur such an additional indebtedness, not to exceed \$45,000, payable within five years. The question is, which shall prevail, the constitution or the legislature? Clearly, the constitution. *Simon v. Northrup*, 27 Or. 487 (40 Pac. 560, 30 L. R. A. 171,) has no bearing on this discussion. The law compelling the County of Multnomah to take over, supervise, and control the free bridges did not require the county to contract an indebtedness therefor. It contemplated, and so provided, that the expenses incident to the management and control of the bridges should be raised by annual taxation, as other expenses of the county.

3. It is contended, however, that the statute under discussion does not provide for the creation of a debt by the county, because it requires the county court to levy a tax annually for five years for the payment thereof. This position is untenable. The legislature directs and requires the county to issue its warrants in payment of the proposed courthouse and site, without limiting the payment of such warrants to any special fund or to the money raised by the special tax. "As a general rule," says this court, in *Avery v. Job*, 25 Or. 512, 520 (36 Pac. 293, 294), "when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference; and, although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way.

The bonds, when issued, become a debt of the corporation, for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of the general fund of the corporation." In *United States v. County of Clark*, 96 U. S. 211, a county subscribed for stock of a railroad company, and issued its bonds in payment thereof, pursuant to a law which authorized the levy of a special tax to pay them, but which contained no provision declaring that the fund derived from such tax only should be so applied. It was held that the bonds were debts of the county as fully as any other liability, the special tax being merely an additional provision for their payment; and that for any balance remaining due, either principal or interest, after the application of the proceeds of the special tax, the holders were entitled to payment out of the general fund of the county. To the same effect is *Lowell v. Boston*, 111 Mass. 454 (15 Am. Rep. 39).

There are decisions holding that where, at the time a contract is made by a county, a fund is on hand and appropriated to its payment, or where one has been provided for, although not yet collected, or where an appropriation has been made of anticipated revenues, and the contract is payable out of such fund or revenue, it does not create an indebtedness within the meaning of the constitution: *Law v. People*, 87 Ill. 385; *Koppikus v. State Capitol Com'rs*, 16 Cal. 248; *People v. Pacheco*, 27 Cal. 175; *People v. May*, 9 Colo. 404 (12 Pac. 838); *Swanson v. City of Ottumwa*, 118 Iowa, 161 (91 N. W. 1048, 59 L. R. A. 620); *Beard v. City of Hopkinsville*, 95 Ky. 239 (24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222, 237, note). But where, as here, no such provision is made, and a liability is incurred payable in the future, it is obviously no less a debt because the municipality is required by special law thereafter to levy a tax for its payment when it becomes due than if no such

provision was made. The principal revenue of a county or other municipality is derived from taxation, and all debts legally contracted by it are payable from such revenue unless otherwise expressly stipulated. The duty to levy a tax in the future for the payment of an obligation due or to become due necessarily implies the existence of a debt against the corporation, which the creditor is lawfully entitled to have paid by the proceeds of the levy. The provision, therefore, requiring the county court to levy the special tax each year for five years, for the payment of the warrants to be issued on account of the construction of the proposed courthouse, is merely an additional means provided for their payment, and does not render them any the less the debt or obligation of the county, or take such indebtedness out of the prohibition of the constitution: *City of Ottumwa v. City Water Supply Co.* 119 Fed. 315 (56 C. C. A. 219, 59 L. R. A. 604, note).

We are therefore constrained to hold, for the reasons given, that the act under consideration is unconstitutional and void, in that it undertakes to compel and require the County of Union to create an indebtedness in violation of the constitution. The decree of the court below is therefore reversed, and one will be entered here as prayed for in the complaint.

REVERSED.

Decided 27 July, rehearing denied 5 October, 1903.

McFARLANE v. McFARLANE.

[73 Pac. 203, 75 Pac. 139.]

MODIFYING DIVORCE DECREE—SERVICE BY PUBLICATION.

1. Where service of the summons in a divorce suit has been made by publication, and the defendant has not appeared, no decree can be rendered that will bind the defendant personally, in the absence of some statutory provision or reservation in the decree, except that the marriage is ended. In such cases decrees cannot be entered awarding to the successful party, costs, for example, or alimony, or attorney's fees, divorces being *quasi in rem* only as to the marital status, but otherwise *in personam*.

STATUTORY POWER TO MODIFY DECREE AS TO ALIMONY OR COSTS.

2. Section 514, B. & C. Comp., providing for a modification of divorce decrees at any time so far as they affect the maintenance of either party, does not authorize

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the revision of such decrees by adding requirements for the payment of items like alimony, costs, or attorney's fees, where the decree was entered without an appearance by the defendant.

MODIFYING DIVORCE DECREE AS TO MAINTENANCE OF CHILDREN.*

3. Under Section 514, B. & C. Comp., authorizing the modification of divorce decrees at any time after their rendition, in so far as they provide for the custody, nurture, and education of minor children, courts may subsequently, on proper notice, require parties in fault to contribute to the future support of their minor children, and to pay a reasonable sum for their past support, as the duty of the parents to care for and educate their offspring is not affected by a divorce.

APPEAL—REMANDING TO ADD PARTIES OR EVIDENCE.

4. Where it appears in an equity suit that the disputed matters cannot be satisfactorily determined by the appellate court because of the condition of the record, as, because of the absence of parties, or because certain evidence has not been taken, the court may, at its discretion, remand the cause for further consideration by the trial court rather than enter a final decree.

STATUTE GOVERNING FILING OF COST BILLS IN SUPREME COURT.

5. Section 568, B. & C. Comp., governs the practice as to taxation of costs and disbursements in the supreme court, by analogy, there being no special statute on the subject.

WHEN JUDGMENT OF SUPREME COURT IS RENDERED.

6. A judgment of the supreme court is final when the decision is announced, or, in other words, that is the date of the "rendition" of the judgment or decree, within the meaning of Section 568, B. & C. Comp., as amended by Laws 1903, p. 209, and the time then begins to run against the right to file a cost bill.

TIME ALLOWED FOR FILING COST BILLS IN SUPREME COURT.

7. Where the taxable costs and disbursements can be ascertained at the time a case is decided the cost bill must be filed within the time limited by statute, in default of which it may be stricken from the files. In this case the successful party could have computed the taxable charges when the judgment was rendered, and should have filed the cost bill within five days thereafter, as required by Section 568, B. & C. Comp., as amended by Laws 1903, p. 209; but not having done so, either within five days or the first day of the next term, the costs must be disallowed.

* NOTE.—As to the right to a supplemental decree compelling a parent against whom a divorce has been granted to support minor children of the parties to the divorce, see *McKay v. Superior Court*, 40 L. R. A. 585; *Alexander v. Alexander*, 45 L. R. A. 806; *Streitwolf v. Streitwolf*, 45 L. R. A. 842.

In cases where a decree of divorce does not award the custody of the minor children of the parties or provide for their support, the father is liable for their support during minority: *Gilley v. Gilley*, 1 Am. St. Rep. 307, but, see *Foss v. Hartwell*, 37 L. R. A. 589.

Where a divorce decree awards the custody of minor children to the mother, but does not adjudge against either party the expense of their support, there is an implied promise by the father to bear such expense, which may be enforced by an original action independent of the divorce proceeding: *Pretzinger v. Pretzinger*, 4 Am. St. Rep. 542; *Re Zillely*, 40 L. R. A. 579; *Gibson v. Gibson*, 40 L. R. A. 567. See, also, *Keller v. St. Louis*, 47 L. R. A. 391.

To the effect that under such circumstances the mother or other person furnishing support to a minor child of the divorced parties cannot maintain an action against the father therefor, on an implied promise, see *Hall v. Green*, 47 Am. St. Rep. 311 (distinguishing *Gilley v. Gilley* in the same state), and note; *Ramsey v. Ramsey*, 6 L. R. A. 682; *Fulton v. Fulton*, 26 L. R. A. 678, 40 Am. St. Rep. 720 (distinguishing *Pretzinger v. Pretzinger*, in the same state); *Brown v. Smith*, 30 L. R. A. 680; *Foss v. Hartwell*, 37 L. R. A. 589, 60 Am. St. Rep. 366.—REPORTER.

From Marion: REUBEN P. BOISE, Judge.

Appeal by defendant A. McFarlane from an order allowing a modification of a divorce decree on plaintiff's motion. After the decision a cost bill was filed and a motion made to strike it from the files.

REVERSED: MOTION TO STRIKE ALLOWED.

For appellant there was a brief and an oral argument by *Mr. Peter H. D'Arcy* and *Mr. George G. Bingham*.

For respondent there was a brief over the names of *Woodson T. Slater*, *William M. Kaiser*, and *Bonham & Martin*, with an oral argument by *Mr. Kaiser* and *Mr. B. F. Bonham*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a proceeding to alter a decree. The facts are that on February 24, 1899, the plaintiff commenced in the circuit court for Marion County a suit against the defendant for the dissolution of the marriage contract existing between them, in which she demanded one third of his real property, particularly describing it, \$1,000 as permanent alimony, \$200 as attorney's fees, and \$50 per month for the support of their minor children. The defendant having left the state prior to the commencement of such suit, the summons was served by publication, and, not having returned or answered, a decree was rendered March 24, 1902, dissolving the bonds of matrimony, awarding the plaintiff the custody of the minor children, one third of said real property, and her costs and disbursements, without other relief. Neither party appealing from said decree, the plaintiff intermarried with one W. D. Claggett, and on February 5, 1903, filed a petition in the original suit, stating in effect the facts hereinbefore detailed, and that the defendant, before the said suit was brought, collected about \$5,000 in money and went to Ontario, Canada, leaving her and their minor children, Robert, Edna, and

Albert, 17, 11, and 8 years old respectively, without money or means of support, and remained out of the state more than three and one half years, and until said divorce was granted; that since the defendant's said departure from the state he has never aided in the maintenance of his minor children, though amply able so to do, and plaintiff has been compelled to support them, at an expense of \$50 per month, or \$2,150, and that the reasonable cost of the future support of the two minor children, Edna and Albert, until they attain their majority, is \$25 per month; that \$1,000 is a reasonable sum to be allowed plaintiff as alimony in the suit, in the prosecution of which she incurred an expense of \$200 as attorney's fees and \$57 as costs and disbursements; that the defendant is now a resident of said county, and can be personally served, wherefore she prayed that a citation be issued requiring him to appear, at a time to be designated by the court, to show cause, if any he had, why the several sums hereinbefore stated should not be allowed her, and, at the hearing, that the decree in the divorce suit be modified so as to require him to pay said sums. The court having made the order prayed for, which being served upon the defendant, he appeared specially and moved to set aside the proceedings on the ground that the court had no jurisdiction of the subject-matter or of his person, but the motion having been overruled, and there being no answer or other plea, the relief prayed for in the petition was granted, and he appeals.

1. The statute regulating the mode of procedure in matters incident to the granting of divorces is as follows: "At any time after a decree is given, the court or judge thereof, upon the motion of either party, shall have power to set aside, alter, or modify so much of the decree as may provide for the appointment of trustees for the care and custody of the minor children, or the nurture and education thereof, or the maintenance of either party to the

suit": B. & C. Comp. § 514. A suit for a divorce, so far as it affects the marital status of the parties, is a proceeding *quasi in rem*, but so far as it relates to collateral matters, such as alimony and costs, it is *in personam*: 2 Bishop, Mar. Div. & Sep. §§ 23, 36, 79; 2 Black, Judg. § 933; Cooley, Con. Lim. (6 ed.) 499; 2 Freeman, Judg. (4 ed.) §§ 584, 586. The plaintiff, observing this rule, took no decree in the divorce suit for alimony, support of the minor children, or attorney's fees, but, having waited until the defendant returned to this state, she instituted this proceeding, and the question to be considered is whether it is maintainable. A text-writer, speaking upon this subject, says: "When the court has allowed the suit to be dismissed, or has finally entered its decree, it has no further jurisdiction over the parties or the subject-matter, except so far as this is reserved by itself or by statute": Stewart, Mar. & Div. § 366. This author further says: "But a decree of divorce *a vinculo* is final, and the jurisdiction of the court over the parties is, after the expiration of the term, at an end; and just as there can be no grant of alimony after such a divorce, so there can then be no change in the award of alimony, unless the right to make such change is reserved by the court in its decree, as it may be, or is given by statute, as it often is": Stewart, Mar. & Div. § 376. The summons having been served by publication, the court was powerless to grant any relief *in personam*, and, no jurisdiction of the subject-matter having been reserved in the decree, the court's resumption thereof, if the right exists after the close of the term at which the decree was rendered, must be found in the statute quoted.

2. In *Howell v. Howell*, 104 Cal. 45 (37 Pac. 770, 43 Am. St. Rep. 70), a suit having been instituted for a dissolution of the marriage contract, the summons was served by publication, and, the defendant not having appeared in person

or by attorney, a decree was rendered divorcing the parties, awarding to the plaintiff the custody of their children, and giving to her all the community real and personal property in California, but the complaint did not demand, nor did the decree grant, any sum as alimony. The time limited for taking an appeal having expired, the plaintiff filed a petition in the original suit, averring that she was in indigent circumstances, and unable to support herself and minor children, and praying that the defendant be required to pay such sum as to the court might seem just for that purpose, and that said alimony be made permanent. A demurrer to the petition on the ground of a want of jurisdiction having been overruled, and the defendant's answer stricken out, an order was made requiring him to pay \$100 a month for the purpose specified, and he appealed. In reversing the judgment, Mr. Justice McFARLAND, speaking for the court, says: "We are satisfied that the court had not jurisdiction to make the order appealed from. A judgment in a divorce suit settling the property rights of the parties, after the time for appealing therefrom has expired, is as final as any other kind of a judgment, except so far as the power to modify it is given by statutory provision. Of course, when we speak of final judgment, we mean one which does not upon its face reserve jurisdiction (when that can be done) to make a supplemental decree, in which case it is not final. In the case at bar there was no such reservation; it was final in form and substance. And there is no statutory provision giving jurisdiction to make the order appealed from. Section 137 of the Civil Code provides that, 'while an action for divorce is pending,' the court may require the husband to pay, as alimony, money necessary to enable the wife to support herself and children and prosecute or defend the action. Section 139 provides that, where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance

of the children and make a suitable allowance for the support of the wife, and that 'the court may from time to time modify its orders in these respects.' But the latter section clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce, and established by the judgment; and the provision is that, where the right to alimony has been thus established, the amount may be changed by a modification of the order. But in the case at bar there was nothing to 'modify.' After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. In the case at bar the judgment became final without any award of alimony, and, of course, the court could not afterwards 'modify' what never existed." We have quoted extensively from this decision, and think it is conclusive in the case at bar upon the question of alimony allowed the plaintiff, and also in respect to the attorney's fees and costs, in the original suit, awarded her in this proceeding.

Mr. Bishop, in his work on Marriage and Divorce (volume 2, 5 ed. § 381a), says: "Where there is an *ex parte* divorce granted in a state in which one party only is domiciled, and the other party does not appear, the court has a jurisdiction to snap the *vinculum* of the marriage, but none to settle the question of alimony. In such a case, it is plain that there ought to be a jurisdiction to pass upon the question of alimony, if afterward the parties are both found within reach of the process of the proper tribunal. But if the case stands merely on the unwritten law which we imported from England, it is difficult to say that there is in our states generally such a jurisdiction." Permanent alimony is an incident to and flows from the decree of legal

separation, and is granted only after the merits of the case have been determined: Stewart, Mar. & Div. § 392. The defendant having been served with the process by publication thereof, and never having appeared in person or by an attorney in the divorce suit, no decree *in personam* could have been rendered therein against him. The plaintiff was not obliged to take a decree in said suit, but, having done so, she thereby waived her right to alimony, costs, and attorney's fees; and, as our statute contains no provision allowing the court jurisdiction to pass upon these questions, when the defendant is found within the reach of its process, and the right to assume such jurisdiction never having existed at common law, the court erred in awarding plaintiff any sum whatever on account of alimony, attorney's fees, and costs in the original suit.

3. The compensation awarded by the court to the plaintiff for her past care, and the allowance for the future support, of the minor children, is based upon the principle that these children were not parties to the divorce suit, and therefore they are not bound by any decree that was or could have been rendered therein: 2 Nelson, Div. & Sep. § 981. This author in the same section, in discussing the question, says: "If the court has made no provision for custody and support in the decree, or has granted the custody to the wife without provision for their support, the provision may be afterwards made upon petition or motion and notice to the husband. Where the statute provides that the court shall have power to modify the order at any time after the decree, it is clear that the court granting the order of custody will retain jurisdiction, not only as to questions of custody, but also as to support, and a wife cannot maintain an action in another court to recover the expense of keeping the children. Her only remedy is to apply to have the order modified by the court which granted it. And upon the hearing the court may

render complete justice, and order the husband to pay for past support." In *McKay v. Superior Court*, 120 Cal. 143 (52 Pac. 147, 40 L. R. A. 585), a divorce having been granted, the plaintiff was awarded the custody of the minor children, but no provision was made for their maintenance, and no appeal taken from the decree. Thereafter the plaintiff, having become the wife of another man, filed a petition in the original suit, praying that the defendant therein be required to pay for the past support and for the future maintenance of said children. At the hearing, an order having been made as prayed for, the defendant, as plaintiff in the proceeding, sought to review the action of the court in this respect, contending that its order was without jurisdiction, and therefore void; but the supreme court, discharging the writ, held that the superior court of California had jurisdiction to make an order, at any time subsequent to a final decree of divorce, requiring the father to maintain and support the children, though no such order was made in the decree, and though their care, custody, and control was awarded by the decree to the mother. In deciding the case, Mr. Justice HENSHAW, speaking for the court, says: "It is to be noted that the order here under consideration, being exclusively for the maintenance and support of the children, is radically a different order from that considered in *Howell v. Howell*, 104 Cal. 45 (37 Pac. 770, 43 Am. St. Rep. 70), in which case it was distinctly said that Section 138 of the Civil Code, and the rights of minor children to maintenance and support under it, were not before the court."

A father is liable for the maintenance of minor children, who have no property of their own, when they are taken from his custody and transferred to the mother's: *Cowls v. Cowls*, 8 Ill. (3 Gilm.) 435 (44 Am. Dec. 708). "Divorce, and decreeing the custody of minor children to the mother," says Mr. Justice ALDIS, in *Buckminster v. Buck-*

minster, 38 Vt. 248 (88 Am. Dec. 652), "do not absolve the father from his parental duties and obligations to his children. He must still be reasonably liable for their support and education. They are of his blood. It is not their fault that their parents have been divorced. It is their right that those who have brought them into the world should take care of them till they are old enough to take care of themselves. So, too, it is the right of each parent to see to it that they are properly nurtured and educated, and, if the one who has the custody does not faithfully perform that duty, the other may apply to the court to correct the wrong." We think the court without doubt had authority, upon the presentation of the petition, to issue a citation to the defendant requiring him to appear and show cause, if any he had, why he should not be required to assist in supporting said minor children, and hence no error was committed in overruling the motion to set aside the service thereof.

4. As no testimony accompanies the transcript, it is quite probable that none was taken at the hearing, and, this being so, the order appealed from is reversed, and, observing a rule heretofore pursued (*School District No. 70 v. Price*, 23 Or. 294, 31 Pac. 657; *Wheeler v. Lack*, 37 Or. 238, 61 Pac. 849; *Tobin v. Portland Mills Co.* 41 Or. 269, 68 Pac. 743, 1108), the cause will be remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

ON MOTION TO STRIKE COST BILL.

Mr. Wm. Kaiser and *Mr. Carey F. Martin* for the motion.

Mr. Peter H. D'Arcy, *contra*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

5. This is a motion to tax costs and disbursements. A supplemental decree herein having been reversed July 27,

1903, the defendant, on December 9th of that year, filed a statement of his costs and disbursements, serving a copy thereof on plaintiff's counsel, who moved to strike it from the files, on the ground that it was not placed thereon within the time prescribed. The clerk having allowed the several items as claimed, plaintiff's counsel contend that an error was thereby committed. The statute prescribing the manner of taxing costs and disbursements was amended by an act approved February 24, 1903, prohibiting the recovery thereof unless the prevailing party to a judgment, decree, or special proceeding, within five days from the rendition thereof, serves on the adverse party entitled to notice an itemized statement of the sums to which he claims to be entitled. Such statement may be filed, however, at any time after the period prescribed, but not later than the first day of the next regular term of the court occurring after the expiration of the first five days, in which case the statement must be served on the adverse party, though he has not appeared. If objections thereto are filed within five days from the expiration of the time allowed to file the cost bill, such statement and objections shall constitute the only pleadings required, and the issue so joined shall be tried as soon as convenient by the court or judge, and from the judgment rendered thereon an appeal may be taken: Laws 1903, p. 209, 210. Though this statute was evidently designed to regulate the mode to be pursued in taxing costs and disbursements in the circuit courts, the rule prescribed ought to be adopted as far as applicable in this court: *Rader v. Barr*, 37 Or. 453 (61 Pac. 1027, 1127).

6. It will be remembered that the cost bill was filed December 9, 1903; but as an excuse for the delay it is maintained by defendant's counsel that a petition for a rehearing was pending until October 5th of that year, and until that was overruled no final decree had been rendered, and

for this reason the statement was filed within the time prescribed. In *Hammer v. Downing*, 39 Or. 504 (65 Pac. 990), it was held that when an opinion is handed down the judgment affected thereby is to all intents and purposes final, notwithstanding the rules of this court allow the defeated party twenty days in which to file a petition for a rehearing, and the conclusion so reached controls the case at bar.

7. It is also insisted by defendant's counsel that stipulations had been entered into between the parties hereto which affected the costs in the case of *McFarlane v. Cornelius*, *post* (74 Pac. 468), and that, objections to a cost bill in that case not having been disposed of until December 7, 1903, it was impossible prior thereto to determine the amount of costs to which their client was entitled, and hence the statement of the items now claimed was filed in proper time. In that case, which was an action arising out of the original decree in this suit, the only controversy involved in the objections to the cost bill related to the expense incurred in printing an abstract and briefs; the stipulations having provided that the outline of the case, and the summary of the law points and argument in support thereof, as printed, might be used in both cases, as far as applicable. The expense of publishing the abstract and brief in the case at bar and the other items included in the statement herein were not necessarily involved in the cost bill in the case of *McFarlane v. Cornelius*, which related to the costs and disbursements to which that plaintiff was entitled, the defendant therein contending that by reason of the stipulations entered into she was entitled to only one half the sum claimed. In the case at bar the costs and disbursements to which the defendant was entitled could have been ascertained when the supplemental decree was reversed, but no statement thereof having been filed until after the first day of the next succeeding term of court occurring after the expiration of the five days from July

27, 1903, the prohibition contained in the statute compels us to disallow the items now claimed. The motion to strike the statement from the files is therefore allowed.

MOTION TO STRIKE GRANTED.

Decided 19 October, rehearing denied 7 December, 1903.

PUGH v. SPICKNALL.

[73 Pac. 1020, 74 Pac. 485.]

VENDOR AND VENDEE—RELATIVES—SPECIFIC PERFORMANCE.

1. Where there is an oral sale or gift of land between relatives, the making of valuable improvements by the donee or vendee in possession is a sufficient part performance of the contract to require a specific performance by the other party; and possession by the grantee before the gift or sale is immaterial. In this case defendant, who was a widow, and seized of a dower interest in certain real estate in which plaintiff, her daughter, had a reversionary interest, orally agreed that, if her daughter would purchase the reversionary interests of the other heirs to the land in order that she might be near defendant to look after and care for her, defendant would surrender all of the same to the daughter's use during her life, except the right of common pasturage. Plaintiff, who was in possession, relying on this agreement, purchased the shares of the other heirs, and placed improvements on the property to the value of several hundred dollars. *Held*, that, since plaintiff was a relative of defendant, plaintiff's possession and the making of valuable improvements on the land by her was sufficient to take such oral agreement out of the statute of frauds; and the fact that plaintiff's possession of the land antedated the parol agreement was immaterial, the consideration for the contract being the care and attention plaintiff was able to bestow on her mother in consequence of her adjacent residence, and the improvements not having been made until after the agreement was entered into.

WAIVER OF INDEFINITENESS OF COMPLAINT BY ANSWERING.

2. Indefiniteness not amounting to a failure to state a cause of action is waived by answering, and such an objection ~~may~~ ^{should} be presented first on appeal.

From Marion: REUBEN P. BOISE, Judge.

This is a suit to enjoin the prosecution of an action at law. The facts are that plaintiff's father having died seized of certain real property in Marion County, forty acres thereof were set apart to her mother, the defendant, as her dower, the reversion thereto being vested in the plaintiff, her brother, and three sisters. In October, 1891, the defendant leased the land so assigned to her, for the term of five years, to the plaintiff, who entered into possession and built a small house thereon, in which she lived with her family. The plaintiff (Johanna Pugh), before

the expiration of the term of her lease, secured the interests of her brother and two of her sisters in the land, and thereupon voluntarily partitioned the premises with the third sister, assigning to her the north eight acres and about one acre in a triangular form in the southeast corner, near which stood a house in a three-acre garden, used as a residence by her mother; the remainder of the premises being then covered with brush and timber. After plaintiff secured said title, she erected a good dwelling house and other buildings on the land, put up fences thereon, and cleared and cultivated about five acres thereof. Her brother, having returned to reside with her mother, began cutting said timber, to prevent which plaintiff appealed to the court, and secured a decree perpetually enjoining him from committing further waste. Her mother (Elizabeth Spicknall) thereupon commenced an action against her to recover possession of the thirty-one acres reserved in said partition, alleging herself to be entitled to the possession thereof, of which she had been deprived for more than six years, to her damage in the sum of \$300. An answer having been interposed to the complaint in the action, the plaintiff filed the complaint herein in the nature of a cross-bill, setting up the facts hereinbefore detailed, and averring that before the expiration of said term of lease it was her intention to remove from the premises, but at her mother's request she refrained from doing so, and at her solicitation purchased said reversionary interests in pursuance of an agreement entered into with her mother, whereby it was stipulated that the latter should occupy the said house and garden and have a common right of pasturage on said premises and the use of the water of the well thereon, and that plaintiff was to have the full and absolute use of the remainder thereof, free from said dower estate, and to live upon said land, that she might be near her mother, and care for her in her sickness; that, rely-

ing upon such solicitation and agreement, the plaintiff purchased said interests and improved the property. The allegations of the cross-bill having been denied in the answer thereto, a trial was had, resulting in a decree permitting plaintiff to remain in possession of all the thirty-one acre tract except the said garden, and that each party have a common right of pasturage and the use of the water of the well on the premises, from which decree the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *John Bayne*, *William H. Holmes*, and *Webster Holmes*, with an oral argument by *Mr. Bayne* and *Mr. W. H. Holmes*.

For respondent there was a brief over the name of *Carson & Adams*, with an oral argument by *Mr. Loring K. Adams*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion.

The plaintiff, as a witness in her own behalf, testifies that on October 3, 1891, she leased, for a term of five years, her mother's farm, including said forty acres, stipulating to pay as rent therefor one third of the crops grown thereon; that in July, 1896, intending to leave the premises at the expiration of the lease, she sought to buy other property with a view of making her home elsewhere, and for that purpose went with her mother to examine a tract of land offered for sale, but desiring the plaintiff to remain on the premises, so that she might be near her and care for her in her sickness, her mother persuaded her to buy the interests of the other heirs in the forty acres, saying that she only desired her home and garden, and that the witness could grub out and cultivate the unimproved part; that at her mother's solicitation she purchased said interests, continued to reside upon the premises, and made valuable improvements thereon, and at all times cared for her

mother, who was afflicted with stomach trouble that necessitated constant attention; that her brother, having returned to his mother's home, began to cut the timber from plaintiff's land, whereupon the difficulty arose which culminated in this suit. The plaintiff's husband, as her witness, corroborates her testimony, and says that the defendant told plaintiff at the time she requested her to purchase the interests of the other heirs that any land on the forty acres outside her garden that they could clear and cultivate, she would never molest in the least, and with this understanding the interests were secured. The defendant, as a witness in her own behalf, testifies that she never gave plaintiff any privileges, except to build a small house on the land, and denies that she ever requested her daughter to buy the interests of the other heirs. The defendant at the time of the trial was seventy-six years old, and her memory must necessarily be defective, for we think the testimony of other witnesses conclusively shows, as the court found, that the purchase of said shares was made at her solicitation and for her benefit, that the plaintiff might be near her in order to care for and look after her, and that, relying thereon, the plaintiff made such purchases and improved the property. The testimony also shows that the improvements placed upon the premises are of the value of from six hundred to one thousand dollars.

1. It is contended by defendant's counsel that this is a suit for the specific performance of a parol contract affecting an estate in real property, and that, plaintiff having been in possession at the time of the alleged agreement, the continued possession is not such a partial performance as to take the contract out of the statute, and that the improvements made upon the premises inured to plaintiff as the reversioner, and hence the court erred in rendering the decree complained of. Plaintiff's counsel insist, however, that the contract entered into between their client

and her mother was a parol license upon the faith of which the interests of the heirs was secured, and that, valuable improvements having been made to the premises in reliance upon such license, it had become irrevocable, and no error was committed in protecting the plaintiff's rights under the agreement. If it be assumed that this is a suit for the specific performance of a contract, the possession of the premises under the lease and the continued possession under the parol agreement are not very important factors when it is remembered that the parties are mother and daughter. When parties are related by affinity or consanguinity, possession of land, under a parol agreement, with the consent of the vendor, may not be sufficient part performance to take the case out of the statute, but the making of valuable improvements by the donee in possession is essential to establish his right to enforce the specific performance of a parol gift of land, and is sufficient for that purpose: *Pomeroy*, *Specif. Perf.* § 130; *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792). "The acknowledged possession of a stranger on the land of another," says Mr. Pomeroy in his work on *Specific Performance*, section 115, quoting from an eminent equity judge, "is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms, the court regarding what has been done as a consequence of contract." The reason for such rule fails in the case of a person who takes possession of the land of his relative, for the possession may have been given as a gratuity, with no thought on the part of the landlord that such possession could be construed as a part performance of a parol agreement. The making of valuable improvements by the person in possession, however, would imply that some authority had been granted for that purpose. Possession alone of land under a verbal contract by a

stranger is sufficient part performance to take a case out of the statute without the payment of a consideration or making improvements: Pomeroy, Specif. Perf. section 115. In the case of a relative, who is permitted to take possession of land, it is the valuable improvements made by him in connection with the possession that tends to evidence a parol agreement. The possession, therefore, of such a person may, as in the present instance, antedate the parol agreement, the consideration for the agreement being the care and attention which plaintiff was able to bestow upon her mother in consequence of her adjacent residence. The testimony conclusively shows that plaintiff made valuable improvements upon the premises after securing the reversionary interest, and, though the cleared land would inure to her after her mother's death, it seems unreasonable to suppose that she would have expended from \$600 to \$1,000 without deriving any benefit therefrom until the happening of that event. The testimony shows that the land cleared and cultivated by the plaintiff was covered with timber, brush, and stumps, and of very little value to the defendant except possibly for pasture. Five acres of this land has been reduced to cultivation, plaintiff has built a good house, woodshed, and other buildings, thus evidencing her reliance upon her mother's representations and agreement; and, believing that an adequate consideration was given for the privilege granted, the decree is affirmed.

AFFIRMED.

ON PETITION FOR REHEARING.

MR. CHIEF JUSTICE MOORE delivered the opinion.

2. It is insisted in a petition for a rehearing that the part of the thirty-one acres to which plaintiff claims to be entitled is not described in the complaint, evidence, or decree with sufficient certainty for identification, and that the decree is broader than the pleadings and findings, in

that it awards to plaintiff the absolute use of a five-acre tract out of the land that was reserved for a common pasture. The complaint states that the defendant, during her natural life, is entitled to the exclusive use of about three acres of the land, whereon are erected her dwelling house and barn, and also to a common right of pasturage in the premises, and contains the following allegation: "The plaintiff and her said husband, C. W. Pugh, have grubbed and cleared a five-acre tract, and that the remainder of said premises have been used jointly, as aforesaid, by both the plaintiff and defendant." No motion having been made by the defendant in the court below requiring the plaintiff to describe the premises to which she claimed to be entitled with greater particularity, it is now too late to litigate the question here presented.

The facts detailed in the opinion are criticised as not being in accordance with the testimony, but we believe a careful examination of the transcript warrants the statements so made. The petition will therefore be denied, and it is so ordered.

REHEARING DENIED.

Argued 8 October, decided 19 October, 1903.

MANARY v. RUNYON.

[73 Pac. 1028.]

STATUTE OF FRAUDS—ORIGINAL PROMISE.

1. Where the president of a corporation orally agreed to reimburse plaintiff for expenses and attorney's fees incurred in certain negotiations between plaintiff and the corporation, if the contract was not consummated, such promise to reimburse was original, and not a promise of the president to pay a debt of the corporation.

CONSIDERATION FOR CONTRACT OF INDEMNITY.

2 Where the president of a corporation agreed that if plaintiff would not revoke his offer to purchase certain stumpage of the corporation, but would hold himself ready for two days to contract with the corporation in compliance with the offer, and would meet defendant at a time specified, defendant would pay plaintiff's expenses and attorney's fees if the contract was not consummated, plaintiff's agreement not to revoke his offer, and to meet defendant at the time specified, constituted a sufficient consideration for defendant's contract.

MUTUALITY OF CONTRACT TO INDEMNIFY.

3. Where defendant agreed that if plaintiff would keep open an offer to purchase certain stumpage for two days, and return to defendant's place of business

to consummate the contract, defendant would pay plaintiff's expenses and attorney's fees if the contract was not consummated, and plaintiff assented to defendant's proposition, and expressly agreed to the terms offered, such contract to indemnify plaintiff was not void for want of mutuality.

QUESTION FOR JURY — NONSUIT.

4. The testimony offered by the plaintiff justified a submission of the case to the jury, for it reasonably tended to support the allegations of the complaint.

COMPETENCY OF EVIDENCE.

5. In an action to recover on an agreement to indemnify plaintiff for expenses and attorney's fees if a certain contract should not be consummated, a letter written by defendant, advising plaintiff that the contract could not be entered into, and asking him to send his bill of costs, upon which defendant would send a check for the same, is admissible.

IDEM.

6. In such an action evidence of the amount of land and the quantity of timber involved in the proposed contract is relevant.

APPEAL — DAMAGES FOR DELAY.

7. Damages for delay necessitated by an appeal as authorized by B. & C. Comp. § 557, cannot be allowed where the supreme court is unable to say from the record that the appeal was not taken in good faith.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by James Manary against Charles E. Runyon. The complaint setting forth plaintiff's cause of action, tersely stated, is as follows: That on April 5, 1902, at Portland, Oregon, the defendant promised and agreed with the plaintiff that if plaintiff would not then revoke, but keep open, a certain written offer made by him to the Beaver Flume & Lumber Company, a corporation of which the defendant was president, to enter into a certain contract of purchase with said company, and meet the defendant at Portland, Oregon, after returning to his home in Marshland, at 2 P. M., April 7, 1902, the Beaver Flume & Lumber Company at said time and place would either accept the offer and contract with plaintiff on the proposed terms, or, in case it contracted with one Eccles, would pay his expenses in negotiating with said company relative to said contract, and such reasonable attorney's fees as plaintiff may have incurred in the negotiations; that in pursuance thereof the plaintiff agreed to, and did, keep open the offer to contract with said company, as requested, and was at the time designated, and is still, able, ready, and willing

to so contract with it; that plaintiff has in all things kept his part of the agreement; that at the time designated, and without cause, the said company declined, and still refuses to contract with the plaintiff, but, on the contrary, entered into an agreement and contract with said Eccles, or a corporation represented by him, to sell the property; that plaintiff has incurred expenses in connection with said negotiations with said company, which defendant promised and agreed to pay, in the sum of \$40, and \$100 attorney's fees; that the plaintiff has demanded payment, etc.—and prays judgment for \$140, with interest, costs, and disbursements. The answer denies specifically each and every allegation of the complaint, and, for a further and separate defense, alleges, in substance, that whatever contract the plaintiff made with reference to said matter was made with the Beaver Flume & Lumber Company, and not with the defendant, Runyon, and that the total expenses incurred by reason of said negotiations do not exceed \$20. A trial was had, resulting in a judgment in favor of plaintiff for \$110, and costs and disbursements, taxed at \$63.15, from which the defendant appeals. When the plaintiff rested his case, the defendant moved for a nonsuit, which motion being denied, the action of the court in this regard is assigned as error. The evidence adduced up to the time of filing the motion is all here in the bill of exceptions, but not the testimony subsequently given, either by the defendant in defense, or the plaintiff in rebuttal.

AFFIRMED.

For appellant there was a brief over the name of *T. J. Cleeton*, with an oral argument by *Mr. Cleeton* and *Mr. Loring K. Adams*.

For respondent there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion.

1. The primary contention of defendant, now made for the first time, is that the complaint does not state facts sufficient to constitute a cause of action. It seems to be the theory of counsel that it is based upon a promise to pay the debt previously incurred by a third person, and that there is no new consideration to support it. Manifestly, however, such is not the nature of the action. Its purpose is to require the defendant to reimburse the plaintiff for expenses and attorney's fees incurred in the negotiations alluded to, which it is alleged the defendant promised to do in the event the Beaver Flume & Lumber Company should contract with Eccles, and consequently not accept his offer, and is a simple money demand upon a direct promise.

2. Again, it is argued that a sufficient consideration is not shown to support the alleged promise or agreement of defendant to reimburse the plaintiff. The consideration consists of plaintiff's agreement not to revoke, but to hold himself ready for the space of two days to contract with the Beaver Flume & Lumber Company in pursuance of his proposal or offer of purchase, and to return to Portland from his home at Marshland and meet the defendant at the time specified, with which agreement, it is alleged, he fully complied. It was not only a promise to do something which required the plaintiff's time and some outlay, but to forbear from doing an act, which forbearance was presumably of some value to the defendant, or the corporation of which he was the president, and was ample, in our opinion, to support the agreement.

3. Nor is the alleged agreement wanting in mutuality. It is sufficiently averred, at least after verdict, that the plaintiff assented to defendant's proposition, and expressly agreed to the terms offered. It was not necessary for the complaint to state the contents of plaintiff's written offer to purchase from the Flume & Lumber Company. The objections to the complaint are therefore not tenable.

4. As to the proofs on the question of nonsuit, but little need be said. The inquiry must be confined to those offered by plaintiff up to the time he rested his case. The testimony subsequently introduced by the defendant and that by the plaintiff in rebuttal is not here, and we cannot, therefore, in its absence, presume that the case made by plaintiff in the first instance, if sufficient to be submitted to the jury, was overcome or weakened thereby. There is a contention on the part of the plaintiff that the bill of exceptions was not properly settled and allowed, and hence that defendant is not in a position to urge this objection, by reason of having omitted to present or deliver his exceptions in writing, particularly stated, to the judge, as the trial progressed, or to have them entered in his minutes, and then or subsequently corrected to conform to the truth. The trial court settled and allowed the bill of exceptions in the usual way, under the general practice, upon presentation to it by the appellant after the trial was concluded, and after an opportunity by the respondent to be heard, and to suggest such amendments as he might deem proper. But it is unnecessary to consider this question now, as, under the view we have taken on the application for a nonsuit, the judgment must be affirmed in any event, although we are strongly impressed that the contention is without merit.

Plaintiff's proofs show, in substance, that he had been negotiating with the Beaver Flume & Lumber Company, through the defendant, its president, and Mr. Cleeton, an officer, for the purchase of standing timber upon about 2,200 acres of land, which it was finally about concluded should be consummated by means of an agreement in the nature of a lease of the land, with permission to remove the timber, upon the payment of an agreed stumpage. The defendant submitted a proposition to the plaintiff, which he took to his attorney, and had a contract drawn

up in conformity therewith, and on the 5th day of April, 1902, the parties met for the consideration thereof. After considerable discussion between them, the defendant suggested that, owing to the length of the proposed agreement, he wanted further time to read it over and familiarize himself with its terms. To this the plaintiff seriously objected, arguing that he had been put off from time to time by defendant, and demanding that it be consummated then and there, or that all negotiations be declared at an end, whereupon defendant proposed that if plaintiff would go to his home at Marshland, and return on the following Monday, the 7th, at 2 o'clock, P. M., he would pay his expenses incurred in the negotiations, including reasonable attorney's fees, provided he sold the property to another party. There had been previous negotiations with Eccles for a sale of the property, and the parties had in mind the possible conclusion of an agreement with him. The actual language of the defendant, as shown by plaintiff's testimony, after an unavailing suggestion that the proposition should be put in writing, was, "I will pay your expenses and your reasonable attorney's fees if you will go home, provided I sell this property" (meaning a sale to Eccles.) This is corroborated by Mr. Duniway, a witness for the plaintiff, who testified that the plaintiff said "he would take the man's [defendant's] word for it," thus indicating that the proposition need not be reduced to writing. It is further shown that the parties then separated, the plaintiff departing for his home at Marshland. On the same day, April 5th, defendant informed plaintiff by letter that they had closed the sale with Eccles, assigning some reasons why they were afraid to consummate the agreement with him, but said further: "In regard to your expenses in the matter, I will do what is right, and also whatever is reasonable in the way of an attorney fee. While I am not legally bound to do so, still I feel that we

have caused you some trouble and expense in the matter, and it is nothing more than right that you should be compensated therefor. * * If you will send me your bill of costs I will be pleased to send you a check for the same." Without further reference to the testimony, here is enough to go to the jury, from which they might reasonably have inferred the consummation of a valid agreement between the parties. There was a proposition on the part of the defendant, and an acceptance on the part of the plaintiff, thus establishing mutuality; and the subject-matter being apt, and the consideration sufficient, as we have seen, there can be no reason for disturbing its findings.

It is suggested that the amount of the verdict is out of proportion to the reasonableness of the expenses and attorney's fee, but this we cannot look into upon the record before us.

5. An objection was made and exception saved to the admission in evidence of the letter above alluded to. It was manifestly pertinent, however, to go to the jury upon the issues, as it had a tendency to establish the agreement relied upon for recovery. There was no error in its admission.

6. Two other exceptions were saved to questions propounded to the plaintiff as to the extent of the land and quantity of timber involved in the negotiations. These questions were manifestly relevant to the inquiry, and were properly allowed.

7. Lastly, the plaintiff moves that damages be awarded him for the delay necessitated by the appeal, under Section 557, B. & C. Comp.; but, being unable to say from the record before us that the appeal was not taken in good faith, the motion must be denied: *Nelson v. Oregon Ry. & Nav. Co.* 13 Or. 141 (9 Pac. 321). Having disposed of all the assignments, and finding no error, the judgment of the circuit court will be affirmed.

AFFIRMED.

Argued 8 October, decided 26 October, 1903.

SILVERFIELD v. FRANK.

[78 Pac. 1032.]

CONSTRUCTION OF CONTRACT—INTENTION OF PARTIES.

Plaintiff having purchased land adjoining defendant's house, and being about to erect houses thereon, defendant threatened to erect a high fence, and their difficulties resulted in a contract whereby plaintiff sold defendant a strip of land lying next to that of defendant, and it was agreed that no house should be erected on the strip, and that no fence, other than a wire or iron one six feet high, should be erected "on the north line of the strip." Subsequently defendant undertook to erect on the strip, but not on the boundary line, a high board fence which was to be painted black. *Held*, that the erection of such fence would be enjoined, as within the meaning of the contract.

From Multnomah: JOHN B. CLELAND, Judge.

This is a suit by Saul Silverfield against Sigmund Frank to enjoin the violation of a written agreement concerning the use of real estate, and to compel the defendant to remove a certain fence or structure from the premises. The facts concerning the execution of the agreement are as follows: The defendant is the owner of lots 5 and 6, in block 265, in the City of Portland, upon which is located his dwelling house, the north side of which is within four feet of his north line. Some time prior to the execution of the contract the plaintiff purchased and acquired title to the west half of lots 7 and 8, adjoining defendant's property on the north, and had contracted for, and was proceeding to erect thereon, three houses or flats, which would cover practically all of his property, and thus interfere with the light and air to the defendant's dwelling, and otherwise impair the enjoyment thereof. The defendant, after some unsuccessful efforts to purchase the plaintiff's property, acquired an option on the east half of lots 7 and 8, and then threatened, if the plaintiff proceeded with the construction of his buildings, to acquire the title to such property, and erect along the south and east sides of plaintiff's property a solid board fence forty feet high, which would have shut out the light and air and otherwise injured and

damaged the plaintiff. After some negotiations between the parties, and as a settlement of their controversy, they entered into the following written agreement:

"Portland, Oregon, November, 25, 1902.

We hereby agree to sell to S. Frank the south twenty feet of lot seven (7), in block two hundred and sixty-five (265), in the City of Portland, Oregon, for the sum of two thousand five hundred and seventy-five dollars (\$2,575.00). The agreement shall be void if said Silverfield shall be unable to purchase the east half of said lots for the sum of (\$3,500.00) within three days from the date hereof, and provided the contractors will consent to modification of their contracts as they now offer to do as to construction of two instead of three houses on said property. No house shall be erected on said south twenty feet, and no fence, other than a wire or iron fence, six feet high, shall be erected on the north line of said south twenty feet during the ownership of said north eighty feet of said lots by said Silverfield. Said S. Frank shall purchase and pay for said twenty feet the said sum of twenty-five hundred and seventy-five dollars (\$2,575.00) within three days from this date and hereby agrees to do so. Silverfield agrees to fill or cause to be filled to its original level, said twenty feet agreed to be sold to said Frank.

In the presence of

G. H. Vore,
Geo. W. Joseph.

S. SILVERFIELD,
S. FRANK."

After the execution of the agreement, the plaintiff purchased the east half of lots 7 and 8, arranged with his contractors for a modification of their contracts so as to provide for the construction of two instead of three houses, deeded to the defendant the south twenty feet of lots 7 and 8, and in all other respects fully performed all the terms of the agreement on his part to be performed. He then proceeded with the erection of two houses upon his property, to cost about \$14,000, when the defendant commenced to and did construct on the twenty feet conveyed to him by the plaintiff, and within about one foot of the north line thereof, a

solid board fence, eighteen feet high, and was threatening at the time of the commencement of this suit to extend its height, and to paint it on the side next the plaintiff's houses a "funeral black." The purpose of this suit is to restrain the construction of such fence, and to compel the defendant to remove so much thereof as has already been completed. Plaintiff had a decree in the court below, and the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Geo. W. P. Joseph*.

For respondent there was a brief over the names of *O'Day & Tarpley* and *Raphael Citron*, with an oral argument by *Mr. Thos. O'Day*.

MR. JUSTICE BEAN, after stating the facts as above, delivered the opinion of the court.

The only question for decision is whether the fence or structure which the defendant was engaged in building at the time the suit was commenced was a violation of the clause in the contract between him and the plaintiff which provides: "No house shall be erected on said south twenty feet, and no fence, other than a wire or iron fence, six feet high, shall be erected on the north line of said south twenty feet during the ownership of said north eighty feet of said lots by said Silverfield." The defendant's view is that the contract does not restrict the use of the property by him, except that he shall put no house thereon, and shall build no fence on the north line except of a certain character; otherwise he may use it as he pleases, and may therefore build a high board fence or structure at any place on the property he may desire, except on the north line. The object to be accomplished in construing a contract is to arrive at the intention of the parties as expressed by the language used. When the language is ambiguous, the surrounding circumstances afford material aid to this end.

There is no room for argument as to the purpose and intent of the parties in making the contract in question. The defendant desired to prevent the construction of a building by the plaintiff so near his dwelling as to interfere with the use and enjoyment thereof by himself and family. The plaintiff's object was to avoid the construction by the defendant of a fence or structure south and east of his buildings which would interfere with the use thereof by his tenants. For these purposes only the contract was made, and, keeping this fact in view, there is no difficulty in interpreting its language, and arriving at the intention and meaning of the parties. There may be some ambiguity, and a very technical construction may support the defendant's contention, but the meaning of the contract is perfectly clear. It provides, in effect, that no house shall be erected on the twenty feet purchased by defendant, and no fence shall be built thereon except a wire or iron fence of a certain character on the north line. The manifest intention of the parties should not be avoided and their purpose thwarted by any technical construction. The fence or structure erected or purposed to be erected by the defendant is within the prohibition of the contract, and the decree is affirmed.

AFFIRMED.

Argued 18 October, decided 28 October, 1903.

FERGUSON v. REIGER.

[78 Pac. 1040.]

EFFECT OF FINDINGS IN TRIAL WITHOUT A JURY—AIDED BY VERDICT.

1. As findings made by the court in a trial without a jury are, by the express provisions of B. & C. Comp. § 159, deemed a verdict, they will cure all formal defects in a complaint, but will not supply necessary allegations.

SUFFICIENCY OF COMPLAINT AFTER VERDICT.

2. A complaint which alleges that defendant sold a business enterprise to plaintiff under an agreement that, if plaintiff should discover that he was not adapted to the business, he might rescind the contract, and on demand defendant would repay plaintiff the sum paid by him into the business; that plaintiff, within the specified period, informed defendant of his desire to rescind; that thereafter the parties agreed on the sum plaintiff should be repaid, and the business and stock was reassigned and the defendant took possession; that plaintiff

had demanded payment of such sum, but defendant had refused to pay, is sufficient after verdict.

SUFFICIENCY OF EVIDENCE—DISPUTED TESTIMONY.

3. Where there is any testimony reasonably tending to support the findings of a judge before whom a case has been tried without a jury, the sufficiency thereof will not be reviewed.

JUSTICE'S COURTS—INTEREST ON CLAIM BEFORE JUDGMENT.

4. Under B. & C. Comp. § 928, limiting the jurisdiction of justice's courts to actions for the recovery of money or damages where the amount claimed does not exceed \$250, a justice's court has no jurisdiction to give interest antedating the judgment when the amount awarded is \$250.

JUDGMENTS AS AFFECTED BY THE PRAYER OF THE COMPLAINT.

5. In law actions the prayer of the complaint limits the amount of the judgment (B. & C. Comp. § 87), except that by the statute interest is added from the date of its rendition; therefore, a court ought not to award interest antedating the judgment when it is not asked.

REMANDING LAW ACTION FOR A PARTICULAR JUDGMENT—COSTS.

6. Where a judgment has been entered for an excessive sum, and the correct amount is ascertainable from the record without evidence, the case may be remanded with directions to enter a specified judgment. In such a case the respondent may be allowed costs, it appearing that the excess was awarded by the trial judge acting as a jury, without any prayer therefor.

From Multnomah: MELVIN C. GEORGE, Judge.

This is an action by W. Ferguson against O. H. Reiger to recover money commenced in a justice's court in Multnomah County by filing a complaint of which the following is a copy:

"Comes now the plaintiff, and for cause of action alleges: That at all the times mentioned in this complaint defendant is and was a resident of Portland District of Multnomah County, State of Oregon.

That on or about the 17th day of February, 1901, at the special instance and urgent request and earnest solicitation of the defendant, plaintiff was induced to purchase from the defendant a certain business enterprise, including the stock of merchandise being in the storeroom, and the fixtures on the west side of said storeroom, at No. 290 Morrison Street, in the City of Portland, County of Multnomah, State of Oregon, for the sum of \$1,000, payable in the manner following: \$200 in cash, \$100 in certain corporation stock, and \$700 to run on account, with the privilege on the part of the plaintiff of paying any part of the said \$700 at any such time as not to draw too heavily from the said

business, provided that all of said balance should be paid on or before the first of the year 1902.

That subsequent to the time of the above agreement, or on or about the 17th day of March, 1901, defendant demanded of plaintiff payment in full for the balance of \$700, and defendant suggested that plaintiff could raise the money by mortgaging the said stock of merchandise and fixtures. This plaintiff refused to do, but complied with the further urgent demand of the defendant in this: that he (plaintiff) gave his promissory note in the sum of \$500, with interest at 6 per cent, payable on or before the first of the year 1902, and the balance of \$200 was to run, with the understanding that it, the said \$200, was to be paid from the earnings of the business during the summer months of 1901; and it was agreed by and between the parties hereto that if at any time during the two months following the 17th day of February, 1901, plaintiff should discover that he was not adapted to the business above mentioned, though urged to undertake its management at the instance of the defendant conditionally, plaintiff should have the right to rescind the contract of purchase, and upon demand defendant should repay to plaintiff the sum of \$300, being the sum paid into the business by plaintiff.

Now, on the 17th day of April, 1901, plaintiff informed defendant that he wished to rescind his contract of purchase for the reason that he (plaintiff) was not adapted to the class of business conditionally purchased of the defendant, and plaintiff therefore demanded of the defendant repayment of the sum of \$300, the surrender of the said promissory note of \$500, and the cancellation of the balance of \$200, the total of which was the full purchase price of the said business at the time plaintiff took possession of the same, and then and there plaintiff surrendered full possession of the business, merchandise, and fixtures aforesaid.

That defendant delivered to plaintiff the said promissory note, and then and there promised and agreed to pay to plaintiff the sum of \$250, this being a compromise sum to which defendant admitted plaintiff was entitled, and the defendant further agreed to cancel the remaining balance of \$200, whereupon defendant was to and did take full

and immediate possession of the business, merchandise, and fixtures aforesaid, and ever since said 17th day of April, 1901, has remained in full possession of the same in so far as this plaintiff is concerned.

That subsequent to this last agreement, and prior to the commencement of this action, plaintiff demanded of the defendant the payment of the said sum of \$250, but that defendant refused and still refuses to pay the same, or any part thereof.

That there is now due and owing from the defendant to the plaintiff the sum of \$250.

Wherefore plaintiff demands judgment against the defendant in the sum of \$250 and for his costs and disbursements in this action."

A motion to strike out parts of this pleading on the ground that they were sham, frivolous, irrelevant, and redundant, having been overruled, an answer was filed, denying the allegations of the complaint, whereupon a trial was had resulting in a judgment from which an appeal was taken to the circuit court for said county, where the cause was retried without the intervention of a jury, and, the court having found that the plaintiff was entitled to recover the sum of \$250, with interest from April 17, 1901, judgment was rendered on said findings, and the defendant appeals to this court. **CONDITIONALLY AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Arthur C. Emmons*.

For respondent there was a brief and an oral argument by *Mr. John B. Easter* and *Mr. Henry Denlinger*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion.

1. It is contended by defendant's counsel that the complaint does not state facts sufficient to constitute a cause of action, and that such defect was not waived by answering to the merits, nor cured by the verdict. Findings made by a court upon the facts in an action tried before it with-

out the intervention of a jury are deemed a verdict (B. & C. Comp. § 159), and, though a verdict will not supply the omission to state some fact essential to the cause of action, it will cure all formal defects in a pleading, and establish every reasonable inference that can be drawn from the facts stated: *Houghton v. Beck*, 9 Or. 325; *David v. Waters*, 11 Or. 448 (5 Pac. 748); *Bingham v. Kern*, 18 Or. 199 (23 Pac. 182). "The extent and principle of the rule of aider by verdict," says Mr. Justice BEAN, in *Booth v. Moody*, 30 Or. 222 (46 Pac. 884), "is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict."

2. Tested by this rule, we think the complaint, which was not challenged by a demurrer, fairly states that on April 17, 1901, the plaintiff was the conditional owner and in possession of a stock of merchandise, store fixtures, and a business enterprise, and that he was indebted to the defendant on account thereof in the sum of \$700, whereupon he delivered said merchandise and fixtures and assigned said business to the defendant, who, in consideration thereof, canceled said indebtedness, and agreed to pay plaintiff on account of the transaction the sum of \$250, and, not having done so, judgment is demanded therefor. We think the complaint, as quoted, in the absence of a demurrer, and after verdict, states facts sufficient to constitute a cause of action, and is adequate to support the judgment.

3. The court found, in effect, that plaintiff, as a compromise of his claim, agreed to accept \$250 in payment of his interest in the stock of goods, store fixtures, and business, which sum the defendant promised and agreed to pay him therefor; but it is maintained by defendant's counsel that the testimony given at the trial does not warrant such finding, and that the court erred in making it. The plaintiff, as a witness in his own behalf, in referring to his hesitancy in purchasing the stock of goods from the defendant, testified that the latter said to him: "You needn't be afraid at all. If inside of two months you cannot make it go, you shall have every cent of your money back." The witness detailed a further conversation he had with the defendant at the expiration of the time so specified, as follows: "'Mr. Reiger, I am afraid I will have to give up the fight;'" and I told him the circumstances of the case, and why I had to do it. He said, 'Well, what do you expect out of the business?'" and I said, 'Well, I think I ought to have \$300,' as I had put in over \$400 in the business; and he said, 'Well, I cannot promise you \$300, but I will guarantee you \$250, and if I sell to good advantage I will give you \$300.'" The witness further says: "I was to receive \$250 positively, or \$300 if he sold to good advantage; but that I was to be guaranteed the \$250." On cross-examination he further testified as follows: "Q. So you are positive, then, that it was the 18th of April that you first spoke to him about giving up the business? A. Yes, sir. Q. At that time you say that Mr. Reiger guaranteed you \$250, or, if he sold to advantage, he would give you \$300? A. That was his words, if he sold to good advantage he would give me \$300. Q. Then the agreement was not, as stated in your complaint, that he simply agreed to give you \$250, but, if he sold to advantage, he was to give you \$300? A. That was how it was stated to me, if he sold to good advantage. I asked for \$300 first. He said he would

pay me \$300, but he would only guaranty me \$250. Q. That is, if he did not sell? A. If he sold to good advantage, he added that he would give me \$300. Q. When did he give you to understand he would make his guaranty good? A. He spoke of it when he sold out. Q. When he sold out of the business? A. Yes, sir. Q. Then you were to wait for what he guaranteed to give you until he sold out the business? A. Yes, sir." It is argued that this testimony shows that no money was due the plaintiff until the defendant resold the stock of goods, and, as no such sale had been made, the court erred in making the finding of which the defendant complains. It will be observed that the witness in his cross-examination seems to confound the sum of \$300 with that of \$250, which he says he was to receive positively, or the former sum if the defendant sold the stock of goods to good advantage. It is true he says he was to be guaranteed the \$250, but, as a guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who, in the first instance, is liable therefor, it is evident that the witness did not understand the meaning of the term, in view of which the court construed his declaration, "I was to receive \$250 positively," as a statement that this sum was payable in any event. The testimony of this witness, though contradicted in every particular by that of the defendant, is not quoted to ascertain its truth or to determine its weight, but to show that the court might reasonably have deduced the conclusion therefrom that the defendant agreed and promised to pay plaintiff the sum \$250 for the property received; and, there being some testimony upon which the finding can rest, it will not be disturbed.

4. The court having rendered judgment for interest on \$250 from April 17, 1901, the time when it is alleged that the stock of goods was redelivered to the defendant, it is

insisted by his counsel that an error was committed in this respect. A justice's court has jurisdiction in actions for the recovery of money or damages only when the amount claimed does not exceed \$250 (B. & C. Comp. § 926), and judgments rendered in such actions bear interest at the rate of six per cent per annum: B. & C. Comp. § 4595. It will be remembered that the sum claimed in the complaint is \$250, and, this being the extent of the jurisdiction of a justice's court, no judgment could have been given therein for interest antedating the judgment rendered.

5. An appeal from a judgment rendered in a justice's court having been perfected, the cause is tried in the circuit court as if originally commenced therein: B. & C. Comp. § 2246. Considering the complaint as having been originally filed in such court, we think it had no authority, in the present instance, to give a judgment for interest antedating its rendition, for the statute prescribing the form of complaint provides that it shall contain a demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated (B. & C. Comp. § 67), and, as interest after the breach of a contract is recoverable only as damages (*Seton v. Hoyt*, 34 Or. 266, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634; *Close v. Riddle*, 40 Or. 592, 67 Pac. 932, 91 Am. St. Rep. 580, and note), the failure to demand the same in the complaint rendered the judgment therefor erroneous.

6. No exception appears to have been taken to this particular part of the judgment at the time of its rendition, and, observing the rule announced in *Graham v. Merchant*, 43 Or. 294 (72 Pac. 1088), the cause will be remanded, with directions to enter a judgment for the sum of \$250, with legal interest from the date of the judgment appealed from; the respondent to recover his costs in this court and in the court below.

CONDITIONALLY AFFIRMED.

Decided 27 July, 1903.

McFARLANE v. CORNELIUS.

[73 Pac. 325, 74 Pac. 488.]

43	513
43	488
43	585
43	513
45	363

SERVICE BY PUBLICATION — POSSIBILITY OF SUBSTITUTED SERVICE.

1. After a divorce suit has been commenced, it must be inferred that neither of the parties is a "person of the family" of the other, within the meaning of B. & C. Comp. § 55, subd. 5, providing that if the defendant be not found the summons may be delivered "to some person of the family" over a stated age, where it appears that they had lived together until the day before the filing of the complaint, that plaintiff had the custody of the minor children by the marriage, and that defendant had left this state, for these statements show that the family relationship was at least suspended. Nor can the minor children who are in plaintiff's care be considered persons of the family of the other spouse under such circumstances.

DIFFERENCE BETWEEN DWELLING HOUSE AND PLACE OF RESIDENCE.

2. The terms "dwelling house" and "usual place of abode," used in B. & C. Comp. § 55, subd. 5, providing for serving process on a member of defendant's family, are synonyms signifying domicile, and have a different meaning from "place of residence," found in section 57, line 8, directing whither the pleadings shall be sent by mail if defendant cannot be served within the state. The former terms refer to the place of permanent dwelling in this state, while the latter applies to defendant's residence, either permanent or temporary, in another state or country.

PUBLICATION — RESIDENCE TO WHICH PROCESS SHOULD BE MAILED.

3. An affidavit for the publication of a summons stating that "defendant is now and was during all the times hereinafter mentioned a resident and inhabitant of this state, and has departed therefrom" and is now at a stated place in a foreign country, inferentially shows that defendant has a fixed and permanent abode in Oregon, but is now temporarily residing elsewhere, and the point of such present sojourning is his "place of residence," within the meaning of that expression in B. & C. Comp. § 57, line 8.

PURPOSE OF PUBLISHING SUMMONS.

4. The object to be accomplished by a publication and mailing of a summons, as directed by Section 57, B. & C. Comp., is to notify the party of the pendency of the suit, and the summons and complaint should be mailed to him wherever he may happen to be at the time, rather than to his place of permanent abode.

SPECIFYING IN THE ORDER THE TIME OF APPEARANCE.

5. "The time prescribed in the order for publication," which must be specified in a published summons, under Section 57, B. & C. Comp., means the number of weeks considered by the judge making the order to be reasonable for publication, so that an order directing a summons to be printed for six consecutive weeks does prescribe "the time for publication," within the meaning of B. & C. Comp. § 57, line 16.

TIME ALLOWED TO MAKE PROOF OF PUBLICATION.

6. B. & C. Comp. § 822, declaring that proof of publication of a notice required to be published in a newspaper may be made by the affidavit of the printer, etc., but that such affidavit must be made within six months after the last day of publication, is directory only; and hence a failure of the printer to make affidavit within that time to the publication of a summons does not affect the jurisdiction of the court to render judgment thereon, if the affidavit is made and filed before the making of the final order.

COLLATERAL ATTACK FOR INSUFFICIENCY OF COMPLAINT.

7. Where complaint in a suit for divorce alleged some facts warranting a decree in favor of plaintiff, such decree cannot be collaterally attacked on the ground that the complaint was insufficient for want of facts.

APPEAL — COSTS — BRIEFS — STIPULATION.

8. The parties in an appeal stipulated that the briefs and abstract therein might be used on appeal in another action, in which the appellee in the first mentioned appeal was appellant. In the other appeal judgment was reversed, entitling appellant therein to costs; and in the appeal for which the brief and abstract were originally prepared there was also a reversal, making the same party liable for costs on that appeal. *Held*, that the stipulation did not operate to make half the costs of printing chargeable to each appeal, but that the successful party in the first appeal was entitled to the full costs of printing.

From Marion: GEORGE H. BURNETT, Judge.

This action was begun October 11, 1902, by A. McFarlane against G. B. Cornelius in the circuit court for Marion County to recover the possession of the west 36 feet of lots 1, 2, 3, and 4, and all of lot 8, in block 8, in the Town of Turner, and also lots 2 and 7, in block 5, of the Town of Mehama, Oregon. The complaint alleges that plaintiff is the owner in fee thereof, and that the defendant is, and for more than 30 days prior to the commencement of the action has been in the wrongful possession of said premises, and unlawfully withholds the same from him, to his damage in the sum of \$200. The answer denies the allegations of the complaint, and for a separate defense avers that the defendant is, and ever since September 12, 1902, has been, the owner in fee of an undivided one third of said lots, and is in and entitled to the actual possession of the whole thereof. The allegation of defendant's ownership of an interest in or right to the possession of said premises having been denied in the reply, a trial was had, resulting in a judgment for plaintiff, wherein it was adjudged that he was the owner and entitled to the immediate possession of said lots, and that he recover the sum of \$100 for the wrongful detention thereof; from which the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Bonham & Martin*, *Alva O. Condit*, *Woodson T. Slater*, and

William M. Kaiser, with an oral argument by *Mr. B. F. Bonham* and *Mr. Kaiser*.

For respondent there was a brief and an oral argument by *Mr. Peter H. D'Arcy* and *Mr. Geo. G. Bingham*.

MR. CHIEF JUSTICE MOORE, after stating the facts as above, delivered the opinion of the court.

At the trial the plaintiff introduced in evidence his chain of title to the premises, and also gave testimony tending to prove the allegations of the complaint, and rested, whereupon, the defendant, to support the averments of the answer, offered in evidence a judgment roll from Department No. 2 of said court, in the divorce suit of Elizabeth McFarlane, as plaintiff, against the plaintiff herein, as defendant, purporting to decree to her an undivided one third of said lots, and also offered in evidence a deed executed by her September 12, 1902, designed to convey said interest to him. An objection to the introduction of said roll, on the ground that the court granting the decree had no jurisdiction of the person of the defendant therein, because the affidavit for the service of the summons by publication was insufficient to support the order therefor, and that the proof of such service was not made within the time prescribed by law, having been sustained, an exception was allowed, and it is contended by defendant's counsel that an error was committed in this respect. The affidavit referred to, omitting the formal parts and copy of the complaint, is as follows:

"I, Elizabeth McFarlane, being first duly sworn, say that I am the plaintiff in the above-entitled cause and court; and that the above-named defendant is now, and was during all the times hereinafter mentioned, a resident and inhabitant of this state, and of Marion County therein; and that he has departed from said State of Oregon, and has remained absent from said state for six consecutive weeks last past, and still so remains absent therefrom; that said

defendant, after due diligence, cannot be found within said state.

That said plaintiff, on the 24th day of February, 1899, duly filed her verified complaint herein, and upon said date placed in the hands of the Sheriff of Marion County, Oregon, a summons in said cause and court, together with a copy of said complaint duly certified to, as by law required, by Webster Holmes, one of plaintiff's attorneys herein; and that said sheriff made diligent search for said defendant in his county, and that said defendant could not be found therein; and that said sheriff, in substance, made his return to that effect.

That a cause of suit exists in favor of said plaintiff and against said defendant, as appears by her complaint on file herein, a copy of said complaint of which the following is a true copy in words, letters and figures, to wit: [Here follows a copy of the complaint, filed February 24, 1899, in which it is alleged that the plaintiff and defendant therein intermarried, January 11, 1874, that since that time they had lived and cohabited together as husband and wife until about February 23, 1899, and that they were then actual residents and inhabitants of said county.]

That said plaintiff has made diligent search and inquiry to ascertain the whereabouts of said plaintiff, and that she cannot find him or locate him in said state, and has been informed, and believes, and therefore states it to be a fact, that said defendant has departed from said state and taken passage for Ontario, Canada; and that he departed from the state, as aforesaid, on the 25th day of February, 1899; and that said plaintiff, at this time, believes he is temporarily located at the City of Hamilton, Ontario, Canada; and that said Hamilton, Ontario, Canada, is his last known postoffice address; and that personal service of summons could not have been made during any of the times mentioned herein upon said defendant in this state; and that personal service at this time cannot be made or had upon him in this state.

That *The Salem Sentinel* is a weekly newspaper, published in the City of Salem, Marion County, Oregon, and is of general circulation therein.

Wherefore this affiant prays this honorable court, or

the judge thereof, to grant an order herein, directing the publication of summons in said cause to be made in a newspaper, to wit: *The Salem Sentinel*, published in the County of Marion and State of Oregon, and that the service be made upon said defendant by publication in the manner in such cases made and provided by law."

Based upon this affidavit, the judge of Department No. 2 of said court, on April 13, 1899, made the following order:

"That the service of summons shall be made upon said defendant by the publication thereof in a weekly newspaper, to wit: *The Salem Sentinel*, published in Salem, Marion County, Oregon, for six consecutive weeks, requiring said defendant to appear and answer said complaint herein on or before the last day of the time prescribed herein for the publication of said summons; and that a copy of said complaint, together with a copy of the summons, be forthwith deposited in the postoffice at Salem, Marion County, Oregon, addressed and directed to said defendant at Hamilton, Ontario, Canada, his last known address, with the postage fully prepaid thereon."

The summons issued in pursuance thereof was, so far as material, as follows:

"To A. McFarlane, the above-named defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled court and suit on or before the last day of the time prescribed in the order for publication made herein, to wit: the twenty-seventh day of May, 1899, and if you fail to so answer, for want thereof, the plaintiff will apply to the court for the relief prayed for in her complaint on file herein, to wit: That the bonds of matrimony now existing between said plaintiff and said defendant be dissolved; that the said plaintiff have the care and custody of the said minor children, to wit: William A. McFarlane, Robert McFarlane, Edna McFarlane and Albert McFarlane. * * And for an undivided estate in fee to a one third of the real property, described in said complaint as follows: [Here the real estate is described as hereinbefore alleged, and the following sums are demanded: Attorney's

fees, \$200; permanent alimony, \$1,000; care of said children during their minority, \$50 a month; the process concluding with the following paragraph:]

This summons is served upon you by order of the Honorable R. P. Boise, Judge of the above-entitled Court for Department Number Two thereof, dated the 13th day of April, 1899, and the date of the first publication being the 15th day of April, 1899, and the date of the last publication will expire on the twenty-seventh day of May, 1899."

The certificate of the sheriff, attached to a copy of the summons, is to the effect that on April 15, 1899, he served the same upon the defendant therein, by inclosing in a sealed envelope plainly addressed to "A. McFarlane, Hamilton, Ontario, Canada," with the postage fully prepaid thereon, a copy of said summons, certified to by him in his official capacity, together with a copy of the complaint, certified to by one of the attorneys for the plaintiff therein, and deposited said envelope in the postoffice at Salem, Oregon, and that between said places a direct communication by mail exists. The printer of the *Salem Sentinel*, on March 1, 1901, made an affidavit to the effect that said summons was published once a week for seven consecutive weeks in said newspaper in the issues dated April 15, 22, 29, and May 6, 13, 20, and 27, 1899. The defendant not having appeared in person or by counsel, the said court, on March 24, 1902, upon such proof of service of the summons, tried the cause, and from the testimony taken found the facts in substance as alleged in the complaint therein, and decreed that said marriage be dissolved, that Mrs. McFarlane was the owner in fee of an undivided one third of said lots, and awarded to her the custody of said minor children, and her costs and disbursements.

1. The statute prescribing the manner of obtaining jurisdiction of the person of a defendant in a civil action or suit, so far as involved herein, is as follows: "The summons shall be served by delivering a copy thereof, together with

a copy of the complaint, prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: * * (5) * * To the defendant personally, or if he be not found, to some person of the family, above the age of fourteen years, at the dwelling house or usual place of abode of the defendant": B. & C. Comp. §§ 55, subd. 5, 396, 400, subd. 2. To uphold his judgment in this cause, plaintiff's counsel, invoking the rule adopted in this state, that, before a substituted service of summons can be relied upon as a means of securing jurisdiction of the person, it must appear from the return of the officer that after exercising due diligence he could not find the defendant (*Trullenger v. Todd*, 5 Or. 36; *Hass v. Sedlak*, 9 Or. 462), contend, by a parity of reasoning, that, before constructive service of a summons can be relied upon to authorize the entry of a decree by default against the property of a defendant which has been brought under the jurisdiction of the court, the affidavit for the service thereof by publication should show that a substituted service could not be made upon such party; and, it appearing from an inspection of the affidavit for an order of publication in the divorce case that the defendant was an actual resident of Marion County, Oregon, though temporarily absent therefrom, he might have been served by delivering a copy of the summons and complaint to some person of the family, above the age of fourteen years, at his dwelling house, or usual place of abode; and, such fact not having been negatived by the affidavit, it did not state facts sufficient to authorize a service of summons by publication, and hence no error was committed by the court in the present action as alleged. Assuming, without deciding, that the rule insisted upon is applicable in a collateral attack, though it was held in *Pennoyer v. Neff*, 95 U. S. 714, in construing the statute of this state, that defects in the affidavit for an order for the service of a summons by publication could only be taken advantage of on

appeal, and could not be urged to impeach the judgment collaterally, which rule has been followed in this state (*George v. Nowlan*, 38 Or. 537, 64 Pac. 1), the fact that plaintiff and defendant in the divorce proceedings had been living together as husband and wife until the day before the suit was commenced, as alleged in the complaint, which is made a part of said affidavit, implies that, though prior thereto said parties may have had a joint residence in Marion County, such inhabitancy had been severed, and, the plaintiff therein having also alleged that she had the custody of the minor children, further implies that they were not occupying their father's residence, nor were they members of his family. If substituted service could have been made upon the defendant by delivering a copy of the summons and complaint to one of his children, because such child was a "person of the family," it would seem necessarily to follow that the service might with equal propriety have been made upon his wife, the plaintiff therein; for, if her children continue to be persons of the family after their father left the state and the divorce suit was instituted, she must sustain the same relation toward him while residing in his dwelling house or usual place of abode. Collusion will not be presumed (B. & C. Comp. § 788, subd. 1), and, when a suit for a divorce has been commenced, it must be inferred that the marital relations have been interrupted, and, the defendant being temporarily absent, the plaintiff and the children, occupying the dwelling house or usual place of abode of the defendant, are not persons of the family within the meaning of the term as used in the statute under consideration; for by the institution of the divorce proceeding the family relations were suspended, in which case the husband and wife may have different domiciles under the law regulating divorces, and particularly so when the husband forfeits his rights by

misbehavior and by desertion of the wife: *Harding v. Alden*, 9 Greenl. (Me.) 140 (23 Am Dec. 549).

2. If personal or substituted service of a summons cannot be made, and the defendant, after due diligence, cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and it also appears that a cause of action exists against the defendant, the court or judge shall grant an order that the service be made by publication of a summons, when the defendant, being a resident of this state, has departed therefrom and remained absent six consecutive weeks: B. & C. Comp. § 56, subd. 2. In the order for service by publication, the court or judge shall direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the defendant at his place of residence: B. & C. Comp. § 57. It will be remembered that the order providing for the service by publication directed that a copy of the complaint and summons be forthwith deposited in the postoffice at Salem, Oregon, directed to the defendant at Hamilton, Ontario, Canada, his last known address, and the certificate of the sheriff is to the effect that he complied with the terms of said order. It is argued by plaintiff's counsel that the affidavit for the service of the summons by publication having disclosed that the residence of the defendant was in Marion County, Oregon, the order directing that a copy of the complaint and summons should be sent to the defendant at Hamilton, Ontario, Canada, was a nullity and any decree rendered in pursuance of such service is void, and hence no error was committed in refusing to receive the judgment roll in evidence. An examination of Section 55, B. & C. Comp., will show that it is the substituted service upon some person of the family above the age of fourteen years, at the dwelling house or usual place of abode of the defendant, that renders him amenable to the process, copies of which have

been delivered to such person for him. The "dwelling house" or "usual place of abode," as used in the statute under consideration, are synonymous terms, and evidently mean a domicile. The defendant's "place of residence," as specified in Section 57, B. & C. Comp., is not stated to be temporary or permanent, so that either of these qualifying words may apply with equal propriety to such place. A distinction is clearly made by these statutes between the defendant's domicile in this state and his residence, either temporary or permanent, in another state or country. In *Walker's Estate v. Walker*, 1 Mo. App. 404, the court, in distinguishing these terms, say: "There is a difference between a residence and a domicile, which, however, may not be capable of easy definition; that is to say, it may be difficult to define both terms in such manner as to escape criticism. But every one can see at least this distinction: A person domiciled here may, for the sake of his health, reside one or more years in some place the climate of which is supposed to be more favorable to his constitution."

3. The words "resident" and "inhabitant" not being synonymous, the latter implying a more fixed and permanent abode than the former (*Board of Supervisors v. Davenport*, 40 Ill. 197), it must be inferred from the affidavit for the service of the summons by publication, which states that the defendant at the time it was filed was a "resident and inhabitant of this state," that he had a fixed abode therein, and was a permanent resident thereof, but that he was temporarily residing at Hamilton, Ontario, Canada. As a person may simultaneously have a permanent and a temporary residence, and the statute not having indicated to which of these places a copy of the complaint and summons should be directed, they were, in our opinion, properly mailed to the defendant's temporary residence. A permanent residence within this state continues to be such

as long as a resident, when absent therefrom, intends to return thereto, but his temporary residence in another state or country only remains as such while he is an actual resident thereof, so that process mailed to the place of his temporary residence, if known, would in most instances reach him, but, if directed to his permanent residence, there might be grave doubts about his ever receiving it.

4. The purpose to be subserved by the enactment of Section 57, B. & C. Comp., undoubtedly was to inform a party defendant without the state of the pendency of a suit or action in which his property might be affected by a judgment or decree to be rendered therein. Such notice, to be effectual, must be brought home to the defendant, if possible, and this is generally best accomplished by mailing copies of the summons and complaint to him at his place of residence in the state or country where he happens to be, rather than the place in which is situated his dwelling house or usual place of abode in this state. We think, in the present instance, that the order of the court was correct in this respect, for the affidavit having stated that the defendant was "temporarily located at the City of Hamilton, Ontario, Canada," and as the word "locate" is defined in Webster's International Dictionary as "to take up one's residence," the judge, in making the order, adopted that meaning, and very properly concluded that the defendant was temporarily residing at Hamilton, Ontario, and that a copy of the complaint and summons should be directed to him at that city: *Collinson v. Teal*, 4 Sawy. 241 (Fed. Cas. No. 3,020).

5. It is maintained by plaintiff's counsel that the order made by the judge, April 13, 1899, based upon Mrs. McFarlane's affidavit, did not specify the time within which the defendant in the divorce suit was required to appear and answer the complaint therein, and, this being so, it was insufficient to justify the service of the summons by

publication, and that any decree based upon such service is void, and hence no error was committed in refusing to receive said judgment roll in evidence. The statute provides that "the defendant shall appear and answer on or before the last day of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. The summons shall always specify the time prescribed in the order for publication, and, if published, the date of the first publication. The time prescribed in the order shall begin to run from the day of first publication, * * and the service of such summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid": B. & C. Comp. § 57. It will be remembered that the order in question provided that the summons should be published for six consecutive weeks, "requiring said defendant to appear and answer said complaint herein on or before the last day of the time prescribed herein for the publication of said summons." The statute also provides, in effect, that the order shall direct the publication of the summons to be made for such a length of time as may be deemed reasonable, not less than once a week for six weeks, and that the time so prescribed shall begin to run from the day of the first publication, which must be stated in the summons, if published: B. & C. Comp. § 57. The order in question limited the time for the publication of the summons to six consecutive weeks, and as such time began to run from the date of the first publication of the process, which was stated in the summons, the only time necessary to be prescribed in the order was the period which the judge deemed reasonable, and, this having been stated, was, in our opinion, a sufficient compliance with the requirements of the statute.

6. The statute regulating the manner of evidencing the means adopted to secure jurisdiction of the person of a

defendant is, so far as material, as follows: "Proof of the service of the summons, or of the deposit thereof in the postoffice, shall be as follows: (1) If the service or deposit in the postoffice be by the sheriff or his deputy, or by a constable or marshal, the certificate of such officer; * * (3) In case of publication, the affidavit of the printer or his foreman, or his principal clerk, showing the same:" B. & C. Comp. § 62. The statute also contains the following provision: "Proof of the publication of a document or notice required by law, or by an order of a court or a judge, to be published in a newspaper, may be made by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made; but such affidavit must be made within six months after the last day of publication": B. & C. Comp. § 822. The affidavit of the printer of the newspaper in which the summons in the divorce case was published shows that the last issue containing the process was that of May 27, 1899, but the jurat discloses that the affidavit was not made until March 1, 1901. If the section last quoted is mandatory, as the lower court evidently determined, the decree in the divorce suit is void, and therefore vulnerable to a collateral attack; but if the statutory provision adverted to is directory only, an error was committed in refusing to receive the judgment roll in evidence. "The consequential distinction between directory and mandatory statutes," says Judge SUTHERLAND, in his work on Statutory Construction (section 446), "is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results." An examination of the statute (B. & C. Comp. § 822) will show that it does not prescribe any penalty for a failure to make the affidavit within the time limited therefor. The plaintiff's counsel,

contending that the requirement that proof of the publication of the summons should have been made within the time prescribed is mandatory, cite the case of *Wendel v. Durbin*, 26 Wis. 390, in which it was held that statutes imposing a duty, and giving the means of performing it, are to be regarded as mandatory. In that case a statute of Wisconsin, prescribing the manner of serving a summons, provided that "the officer or person making such service shall indorse on such copy, over his signature, the date of such service, and that the same is a true copy of the original"; and, the defendant having been served with a copy of a summons that did not contain such indorsement, judgment was rendered against him by default, which he moved to set aside on the ground that no summons had ever been served in the manner required by law. The motion having been denied, the defendant appealed, and Mr. Chief Justice DIXON, speaking for the court, in reversing the judgment, says: "The statute in question imposes a duty upon the officer or person serving the process, which is beneficial, or may be beneficial, to the party served. Without such indorsement the ignorant or illiterate may not know, or may not remember, the date of service; and so the time for answering may expire, and the opportunity for defense be lost, with little or no fault on their part. It was for the protection of such the statute was enacted." In that case, the defendant having moved in the original action to set aside the judgment, the attack thereon was direct, and the conclusion reached was undoubtedly correct, for, as is said by a text-writer: "When the statute prescribes the form of service or mode of obtaining it, that mode must be pursued strictly": Brown, Juris. § 41.

In *Choate v. Spencer*, 13 Mont. 127 (32 Pac. 651, 20 L. R. A. 424, 40 Am. St. Rep. 425), the Supreme Court of Montana, evidently in a collateral proceeding, though said

to have been a direct attack, having held that a judgment, based upon the personal service of a summons that had impressed thereon the seal of the probate instead of that of the district court, was void, and that a deed executed in pursuance of a sale under execution issued upon such judgment would be canceled in equity as a cloud upon the plaintiff's title, the conclusion thus reached is severely criticised in the notes to that case, the editor saying: "Such decisions subject judicial tribunals and their administration of justice to just opprobrium, and even a professional man, familiar with the technicalities of the law, cannot but sympathize with the feelings of contempt generated in the mind of a layman when he sees courts overlooking the substance and equity of proceedings, and determining the rights of parties upon such formal and puerile considerations as an error of a clerical officer in picking up the wrong seal and impressing it upon the process of the court." To the same effect, see *Sanford v. Edwards*, 19 Mont. 56 (47 Pac. 212, 61 Am. St. Rep. 482), a decision by the same court, reaffirming the doctrine announced in the preceding case, which is also adversely commented upon in the exhaustive notes thereto. The statute requiring that proof of service shall be made within six months after the last day of publication does not relate to the form of service, but to the mode of evidencing it, and, this being so, we believe the requirement is not mandatory, but only directory. To reach a different conclusion might result in placing it within the power of the printer of a newspaper, if he so desired, to defeat the jurisdiction of a court, for by refusing to make the necessary affidavit, and appealing from the judgment requiring him to do so, the time limited for the performance of the duty might possibly expire before the cause could be heard on appeal. The frustration of the power to hear and determine causes, which might possibly result from pursuing

the course assumed, leads us to conclude that if the statute under consideration, which is general in its scope, is applicable to the publication of a summons, it is directory only, and, as the affidavit was made before the decree was rendered, the proof was sufficient (*Osgood v. Osgood*, 35 Or. 1, 56 Pac. 1017); for, as was said by Mr. Chief Justice EUSTIS, in *Wilson v. State Bank of Alabama*, 3 La. Ann. 196, "when a statute directs a thing to be done at a certain time, it does not necessarily follow that it may not be done afterwards."

7. It is also contended by plaintiff's counsel that the complaint in the divorce suit did not state facts sufficient to authorize a decree dissolving the marriage contract, and for this reason no error was committed in rejecting the judgment roll therein. In the trial of that suit the court necessarily determined that the complaint was sufficient, and, there having been some facts alleged upon which this conclusion was based, the decree is not void, and hence not vulnerable to collateral attack: *Woodward v. Baker*, 10 Or. 491; *Berry v. King*, 15 Or. 165 (13 Pac. 772); *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95); *Crabill v. Crabill*, 22 Or. 588 (30 Pac. 320); *Bank of Colfax v. Richardson*, 34 Or. 518 (54 Pac. 359, 75 Am. St. Rep. 664); *Altman v. School District*, 35 Or. 85 (56 Pac. 291, 76 Am. St. Rep. 468); *McNary v. Bush*, 35 Or. 114 (56 Pac. 646); *George v. Nowlan*, 38 Or. 537 (64 Pac. 1).

Other reasons are assigned in support of the action of the trial court, but deeming them immaterial, and believing an error was committed in refusing to receive the judgment roll in the divorce suit as evidence in this action, the judgment is reversed and a new trial ordered.

REVERSED.

ON OBJECTIONS TO COSTS.

Mr. Peter H. D'Arcy for the motion.

Mr. William M. Kaiser and *Mr. Carey F. Martin*, *contra*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

8. This is a motion to tax costs and disbursements. A judgment for the plaintiff having been reversed in this court, the defendant filed a cost bill, containing, *inter alia*, the following items: To printing an abstract, \$39; a brief, \$13, and a reply brief, \$6.50. The plaintiff objected thereto, on the ground that the parties had entered into a stipulation whereby he was liable for the payment of only one half of these sums. The stipulation relied upon provides that the abstract and briefs filed in this action might be used as such in the suit of Elizabeth McFarlane against the plaintiff herein, but no express agreement was made regarding the costs or disbursements in either case. In that suit (*McFarlane v. McFarlane*, 43 Or. 477, 73 Pac. 203), a supplemental decree was rendered for the plaintiff, which was reversed upon appeal, thereby entitling this plaintiff, the defendant therein, to his costs and disbursements. This cause of action arose out of the original decree in the suit, and the stipulation entered into was intended to avoid the expense of printing in the other case. The abstract and briefs printed and used at the trial of this action on appeal were also used at the trial of that suit, but no additional expense in the latter case was incurred on account thereof. The parties not having agreed concerning the costs and disbursements in either case, and Elizabeth McFarlane not being a party hereto, the expense of printing is properly chargeable in this action only, and the defendant should be allowed the sums claimed therefor, and it is so ordered. OBJECTIONS OVERRULED.

Argued 7 October, decided 19 October, 1903.

CONANT'S ESTATE.

HABIGHORST v. CONANT.

[73 Pac. 1018.]

ESTATE OF DECEDENT—VACATING DECREE FOR FRAUD.

1. The testimony herein does not justify the vacation of the decree of final settlement on the ground of fraud.

VACATING DECREE AFTER CLOSE OF TERM—JURISDICTION.

2. A final order entered by a court having jurisdiction cannot be vacated after the close of the term at which it was entered; though an order entered without jurisdiction may be set aside at any time.*

WHAT CONSTITUTES A FILING OF A PAPER.

3. Under B & C. Comp. § 546, providing that "a pleading or paper shall be filed by delivering the same to the clerk at his office, who shall endorse on it the day of the month and the year, and subscribe his name thereto," a paper is filed when it is delivered to the clerk with the intention that it shall become part of the official records, and such filing is not affected by the clerk's failure to endorse the same: *Hills v. Hills*, 43 Or. 162, distinguished.

STATUTES—FILING PROOF OF PUBLICATION OF NOTICE.

4. The requirement of Section 1159 of B. & C. Comp., that a copy of the published notice to the creditors of an estate shall be filed within six months from the date of such notice, is directory only, and the failure to file the notice will not affect the validity of the final decree, if the notice was in fact published.

From Multnomah: JOHN B. CLELAND, Judge.

This is an appeal from a decree of the circuit court reversing an order of the county court setting aside and vacating a decree of final settlement of the estate of Wallace L. Conant, deceased. Conant died in March, 1898, leaving his wife as his sole heir. On April 23d of that year, H. A. Keinath, the father of Mrs. Conant, was appointed administrator of the estate. He duly qualified, and immediately thereafter published notice, as required by law, of his appointment, notifying all persons having claims against the estate to present the same, with the proper vouchers, to the administrator at a place designated, within six months from the date of the notice. On October 31, 1898, the administrator filed his final account, and an order of the county court was made fixing Decem-

* NOTE.—See, also, *White v. Ladd*, 41 Or. 824.—REPORTER.

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ber 7th following as the time for the settlement thereof, and requiring the administrator to publish notice of the proposed settlement as required by law. The notice of final settlement was duly published, and on December 7th the account of the administrator was examined and approved by the county court, the estate closed, and an order made discharging the administrator upon his filing a receipt from the heir at law for the balance in his hands. On September 26, 1899, Habighorst & Co., a creditor of the estate, whose claim had not been presented or paid, filed a petition in the county court to vacate and set aside the decree of final settlement, and for permission to present its claim to the administrator for allowance. It alleged as a basis for the relief sought, in substance: (1) That the appointment of the administrator was obtained and the settlement of the estate so managed and conducted as fraudulently to mislead and prevent creditors from collecting their claims, with the purpose and intent of securing the funds of the estate for the administrator's daughter; (2) that the petitioner did not present its claim to the administrator for allowance, relying on his promise and representation that it would be paid without formal presentation; and (3) that the decree of final settlement is void because no proof of the publication of notice to creditors, or of the notice of final settlement, had been filed with the clerk of the county court at the time the decree was made. The county court allowed the petition, but upon appeal its decree was reversed by the circuit court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Dell Stuart* and *Mr. Harry K. Sargent*.

For respondent there was a brief and an oral argument by *Mr. William Y. Masters*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. There is not a sufficient basis shown by the record for disturbing the decree of final settlement in the county court on the ground of fraud. The appointment of the administrator was regularly made, notice thereof was given by publication in a newspaper of general circulation in the county, all the proceedings in the administration of the estate were conducted in due form and with all the publicity required by law. The only evidence tending to show want of good faith is that one claim against the estate was paid without being properly presented. At the presentation of another, the attorney for the estate expressed some surprise that the claimant knew of the appointment, and said that it was the desire to settle the estate with as little notoriety as possible, as there were some claims which they did not wish to pay; and that the petitioner did not present its claim to the administrator because of some promises or representations made by him. This, however, is not sufficient evidence to justify the setting aside or vacating a decree of a court of competent jurisdiction, made in a judicial proceeding regularly conducted, and particularly on the petition of a party who knew of the pending proceedings.

2. The important, and practically the only, question for decision is whether the decree of final settlement in the county court is void for want of jurisdiction. If so, that court had a right to vacate and set it aside at any time, and did not err in so doing. If, however, the decree was not void, it could not be disturbed by the court entering it after the expiration of the term, and the decree from which this appeal is taken should be affirmed: *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710).

3. The objection to the decree of the county court is that neither the notice to creditors nor of final settlement,

with proof of publication, were on file with the clerk of the county court at the time the decree was made. Both of these notices, with due proof of their publication, are among the papers and files of the estate, but there were no indorsements thereon by the clerk prior to the 25th of May, 1900, when, by order of the county court, he filed them as of the date of the final decree. When these papers were delivered to the clerk, and how they come to be among the papers of the estate, are controverted questions in the case. The clerk and each of his deputies made affidavit that they were not presented for filing prior to the decree of final settlement. The affidavit of the attorney for the administrator, however, is that he procured copies of the notices referred to, with due proof of the publication thereof, from the publisher of the paper, "and duly delivered them to the clerk of this court to be filed ; that I am unable to state the exact day at which I so delivered said papers to said clerk, but the same were so delivered before the entry of the decree herein discharging said administrator ; * * that for some reason unknown to me the clerk of this court has neglected to indorse his file mark on said proofs of publication of said notices and said claims ; that the same were duly presented to this court upon the hearing of said final account, and said account was duly and regularly approved, and said administrator discharged." The decree of final settlement recites the due publication of both notices. The circuit as well as the county court found from the affidavits submitted that, as a matter of fact, the notices, with due proof of the publication thereof, were presented to the county clerk for filing prior to the date of the final settlement, and that each of such papers has ever since been, and now is, among the papers of the estate. The recitals in the decree of final settlement, the affidavit of the attorney for the administrator, whose recollection is more likely to be accurate than that of the county clerk or his deputies,

who are each day intrusted with many papers for filing, and the fact that the notices, with proof of publication thereof, were found among the files of the estate in the custody of the clerk, show quite clearly, in our opinion, that they were delivered to him for filing at or before the date of final settlement, and were in the possession of the court and acted upon by it at the time, and have ever since remained among the files of the estate. The question, then, is whether such facts show a filing within the law.

The statute provides that "a pleading or paper shall be filed by delivering the same to the clerk at his office, who shall indorse upon it the day of the month and the year and subscribe his name thereto": B. & C. Comp. § 546. It will be observed that this statute does not make the indorsement by the clerk a prerequisite to the filing, or provide that no paper shall be deemed filed without such indorsement. The filing consists in delivering the paper to the clerk with an intention that it shall be filed. The law imposes the duty upon the clerk of making the proper indorsement thereon, but his failure to do so cannot affect the validity of the filing. A paper or document is filed within the meaning of this statute when it is delivered to and received by the clerk to be kept among the files of his office, subject to the inspection of the parties. The indorsement required to be made thereon by the clerk is intended merely as a memorandum and as evidence of the time of the filing, but is not essential thereto. The act of filing consists in presenting the paper to the proper officer, and its being received by him and deposited among the records of his office. "A paper is said also to be filed," says Mr. Bouvier, "when it is delivered to the proper officer, and by him received to be kept on file": Bouvier's Law Dictionary. Mr. Abbott defines filing as "to place papers upon a file; or, more generally, to deposit papers in official custody, or receive them officially for orderly and system-

atic safe-keeping." Again: "'To file' and 'filing' mean the act either of the party in bringing the paper and depositing it with the officer for keeping, or the act of the officer in folding, indorsing, and putting up the paper'": Abbott's Law Dictionary. It has accordingly been held by this court that under our statute a paper may be filed without being marked or indorsed by the clerk: *McDonald v. Crusen*, 2 Or. 258; *Moore v. Willamette T. & L. Co.* 7 Or. 359; *Hilts v. Hilts*, 43 Or. 162 (72 Pac. 697). And such are the authorities elsewhere: 8 Ency. Pl. & Pr. 923; 13 Am. & Eng. Ency. Law (2 ed.), 13.

4. It does not appear that proof of the publication of the notice to creditors was filed within the time provided in Section 1159, B. & C. Comp., but, as we regard it, this is of no importance in this case. The notice was properly given, and it is immaterial, so far as the validity of the decree of final settlement is concerned, whether the proof of that fact was filed within the six months or not. The time within which a creditor is required to present his claim begins to run from the first publication of the notice (Section 1159, B. & C. Comp.), and not from the filing of the proof thereof with the county clerk. The publication, and not the filing, is, therefore, the vital fact to be considered, and the date of the filing is not jurisdictional. The statute requiring it to be made within a certain time is directory, and not mandatory: *McFarlane v. Cornelius*, 43 Or. 513 (73 Pac. 325). We are of the opinion, therefore, that the decree should be affirmed, and it is so ordered.

AFFIRMED.

Decided 19 October, 1903; rehearing denied 8 February, 1904.

McCALL v. MARION COUNTY.

[73 Pac. 1081, 75 Pac. 140.]

ESTABLISHING HIGHWAYS—NATURE OF APPEAL PROCEEDINGS.

1. An appeal to the circuit court from an assessment of damages in a proceeding brought to establish a public highway, taken under Section 4789, B. & C. Comp., brings up only the question of damages, and does not involve the regularity of any other matter.

METHOD OF TRYING HIGHWAY PROCEEDING ON APPEAL.

2. Where a statute provides only for an appeal from the decision of the county court in awarding damages in proceedings for the establishment of a highway, like Section 4789, B. & C. Comp., such appeal is tried as an action at law, the appellant being considered as the plaintiff and the county as the defendant, just as would have been the case had the landowner brought an original action in the circuit court for damages for the location of the road.

APPEAL TO CIRCUIT COURT—REMANDING TO COUNTY COURT.

3. Where an appeal is taken to the circuit court from an order of damages in highway establishment proceedings, such court has no jurisdiction, after trial, to remand the case to the county court for judgment, but is itself required to render such judgment as the parties are entitled to.

RIGHT OF APPEAL NOT DEPENDENT ON ESTABLISHMENT OF THE ROAD.

4. The right of appeal in highway opening proceedings given by B. & C. Comp. § 4789, is not dependent on the order of the county court directing the road to be opened or established as authorized by section 4788, but is dependent upon the giving of the judgment for damages.

ALLOWANCE OF COSTS ON APPEAL IN HIGHWAY PROCEEDING.

5. In view of Section 576, B. & C. Comp., providing that, in all actions prosecuted or defended in the name or for the use of any county, the latter shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons, and section 4789 authorizing an appeal by a landowner from an assessment of damages in highway opening proceedings, and declaring that, if he fails to recover a more favorable judgment on appeal than the report appealed from, he shall pay all costs of the appeal, and considering that the trial on such an appeal is substantially a law proceeding, the costs and disbursements should correspondingly abide the result.

CONDEMNATION FOR PUBLIC ROAD—FORM OF JUDGMENT.

6. The purpose of a judgment in condemnation proceedings, as, for a public road, is to judicially fix the amount to be paid for the taking of the required property, and no personal judgment should be entered, so far as the award is concerned.

From Marion: GEORGE H. BURNETT, Judge.

During the year 1902, proceedings were instituted in the county court of Marion County for the location and establishment of a county road across the lands of Samuel A. McCall and wife, the appellants. At the proper time they filed a claim for damages in the sum of \$1,105.18, and

the county court thereupon appointed three disinterested householders to view the premises and assess the damages. The viewers reported that the appellants' premises would not be injured by the location or opening of the road. The report was approved by the county court, and an order made "that the said road be, and the same is hereby, established in accordance with the survey and plat submitted herein." Thereafter, and within the time allowed by law, the appellants appealed to the circuit court from the assessment of damages, and upon such appeal the jury returned a verdict finding "that the real property of the appellants would, by the establishment of the proposed county road described in the pleadings, be rendered less valuable in the sum of three hundred and eighty dollars." The appellants moved for judgment on the verdict and against the county, and for their costs and disbursements. This motion was overruled, and a judgment or order entered reciting "that appellants' premises will be rendered less valuable in the sum of \$380 by the opening and establishment of the proposed road," remanding the cause to the county court "for such further proceedings as may be lawful and proper," and ordering and adjudging that neither party recover costs or disbursements. From this judgment the present appeal is taken by the McCalls.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. John A. Jeffrey* and *Mr. R. J. Fleming*.

For respondent there was a brief over the names of *Julius N. Hart*, District Attorney, and *John H. McNary*, with an oral argument by *Mr. Hart*.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. If any person, through whose lands any county road may be viewed and marked out, shall feel that he would

be injured by the opening of the road, he may make complaint thereof in writing to the county court at the time the report of the viewers is received. The county court is thereupon required to appoint three disinterested householders, who shall proceed to view the proposed road through the premises of the complainant, and assess and determine "how much less valuable such premises of the complainant would be rendered by the opening" of the road : B. & C. Comp. § 4787. If the county court is satisfied that the damages so assessed are just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages to be paid by the county, it shall order the same to be paid to the complainant out of the treasury. If, in the opinion of the court, however, such proposed road is not of sufficient importance to the public to cause the damages to be paid by the county, it may refuse to establish the same as a highway unless the damages, or such part thereof as the court may think proper, shall be paid by the petitioners : B. & C. Comp. § 4788. If the claimant conceives himself aggrieved by the assessment as made by the viewers and the county court, he may appeal therefrom to the circuit court. Such appeal shall be taken "in the same manner as appeals from justices of the peace, and if the appellant shall fail to recover a judgment more favorable than the report appealed from, he shall pay all costs of the appeal" : B. & C. Comp. § 4789. An appeal to the circuit court from the assessment of damages, in proceedings for the establishment of a county road, under the statutes referred to, merely brings up the question of damages, and does not involve the regularity of any of the other proceedings : *Hammer v. Polk County*, 15 Or. 578 (16 Pac. 420); *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758). It does not affect the right of the county court to locate and establish the road, or chal-

lenge its regularity. The sole question to be tried is the amount of damages, if any, the claimant will sustain.

2. The statute makes no provision as to the mode by which that question shall be tried on the appeal, and therefore the rules of practice and procedure which prevail in ordinary actions at law must be the guide: Elliott, Roads & Streets (2 ed.), § 362. The reasonable presumption is that when the legislature gave the right of appeal, and made no provision for the procedure thereon, it meant that the practice in ordinary actions and proceedings in the circuit court should apply. The cause on appeal must be tried as an ordinary action at law, without formal pleadings, however, and must necessarily result in a judgment either for or against the appellant.

3. There is no statute authorizing the circuit court, after it has determined the amount of damages which the landowner will sustain, to remand the cause to the county court; and, without some provision to that effect, it has no authority to do so. It must proceed to try the case and render judgment therein as in any other action. The appellant, who seeks for a greater amount of damages than that awarded him in the county court, may very properly be regarded as the plaintiff in the circuit court, and the county as the defendant. This has generally been recognized as the proper mode of treating the parties on appeal. After the appeal is taken, the matter stands for trial in the circuit court the same as if the appellant had brought an action therein against the county to recover damages for the location of a county road on his premises, and is to be tried and determined under the same practice and rules of procedure.

4. What effect the judgment of the circuit court may have, in addition to establishing the amount of damages to which the appellant is entitled, and whether the payment thereof can be avoided by the refusal of the county

court to open the road, are questions which it is not necessary to consider here. The statute provides the remedy, and the landowner's right to appeal from the assessment of damages is in no way dependent upon the order of the county court opening or establishing the road: *Hammer v. Polk County*, 15 Or. 578 (16 Pac. 420); *McNichols v. Wilson*, 42 Iowa, 385.

5. We are of the opinion, also, that, under the statute, if the appellant recovers a judgment on the appeal more favorable than the report appealed from, he is entitled to his costs and disbursements. As we have already said, the proceedings on appeal become in effect an action at law by the landowner against the county to recover damages for the taking of his property for a county road, and the statute provides that, in all actions or suits prosecuted or defended in the name and for the use of any county, the county shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons: B. & C. Comp. § 576. Where a special proceeding for the condemnation of land for public purposes is provided by statute, and no provision made for the recovery of costs, they cannot be awarded: *Wisconsin Cent. R. Co. v. Kneale*, 79 Wis. 89 (48 N. W. 248); *Cornish v. Milwaukee & L. W. R. Co.* 60 Wis. 476 (19 N. W. 443); *Hampshire & H. Canal Co. v. Ashley*, 15 Pick. 496. But where the questions involved must be tried out as in ordinary actions, the general laws on the subject of costs will prevail, except as otherwise specially provided. Now, there is no special provision for ascertaining on appeal from the county court the damages that should be awarded to a landowner as a consequence of the location of a county road over his land. That must be determined the same as any other question of fact in an action at law, and, if the appellant prevails on the appeal, he is entitled to his costs. It follows from these views that the judgment of the court below must be reversed,

and the cause remanded, with directions to render judgment on the verdict in favor of the appellants and against the county for the amount thereof, and for their costs and disbursements. REVERSED.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion of the court.

Question is made as to the form of the judgment which should be entered against a county on an appeal from an assessment of damages in the matter of the location of a county road. Attention is called to some expressions in the opinion, from which it is inferred that the court intended that a judgment *in personam* should be entered. The taking of private property, without the consent of the owner, for a county road, is by virtue of the power of eminent domain. The proceedings for that purpose are by analogy the same so far as it affects the form of the judgment as an action by any other corporation authorized to exercise the power. Its purpose is simply to ascertain and fix judicially the amount which the county should pay as a just compensation in order for it to be entitled to take the property for a county road, and no personal judgment should be entered against it for the amount of the award. The judgment against the county or other corporation in all condemnation proceedings is simply to adjudicate that the amount found due and assessed is a just compensation to be paid by the corporation for the property sought to be condemned, and should be so entered: *Oregonian R. Co. v. Hill*, 9 Or. 377; *Oregon R. Co. v. Bridwell*, 11 Or. 282 (3 Pac. 684); *Florence, El. D. & W. V. R. Co. v. Lilley*, 3 Kan. App. 588 (43 Pac. 857); *City of Bloomington v. Miller*, 84 Ill. 621. The petition is denied.

REHEARING DENIED.

REHEARING DENIED.

Argued 12 October, decided 26 October, 1908.

MENDENHALL'S WILL.

[72 Pac. 818, 73 Pac. 1083.]

DISMISSING APPEAL.

1. Irregularities in an appeal from a county court to the circuit court may be reviewed on appeal to the supreme court, but do not afford any ground for dismissing the latter appeal, since they do not pertain to either the jurisdiction or the rules of the last-named court.

SERVICE OF NOTICE OF APPEAL ON ADVERSE PARTIES.

2. Since the amendments of 1899 and 1901 relating to the manner of taking appeals to the supreme court (now embodied in B. & C. Comp. § 549, subd. 1), the notice of appeal need not be served on any adverse parties except those who have appeared.

MOTION TO DISMISS APPEAL—MISSING TESTIMONY.

3. The question whether or not certain testimony taken in the cause in the county court and lost was retaken or supplied, or the irregularity waived in that court, is immaterial on a motion to dismiss the appeal from the circuit court, it appearing from the record that all the testimony that was before the county court at its final hearing on the merits accompanies the transcript to the supreme court.

BURDEN OF PROOF IN PROBATING WILLS.

4. Where the validity of a will is attacked by a direct proceeding after probate in common form, or on *ex parte* proceedings, the person seeking to maintain the validity of the will has the burden of proving every essential fact, not admitted or waived by the pleadings, necessary to authorize probate in the county court.

PETITION FOR CONTEST OF WILL—NECESSARY ALLEGATIONS.

5. The allegations of a notice of contest of a will must be sufficiently broad and specific to call in question the validity of the will or the competency or sufficiency of the proof of its execution, and should point out with reasonable accuracy the specific points on which reliance will be placed to set aside the probate.

EXAMPLE OF SUFFICIENT NOTICE OF CONTEST.

6. A petition contesting a will, which alleges that the paper admitted to probate as the will of decedent was not decedent's will; "that the same was not signed by her, nor was the same witnessed as by law required, or witnessed at all, in fact; that said paper was never executed as or for a will, and was never intended by said decedent to be her last will"—is sufficient to raise the question whether decedent subscribed the instrument or acknowledged its execution in the presence of the subscribing witnesses, especially where the proponent, in his answer, avers that decedent signed the will in the presence of the witnesses, to whom she thus declared the same to be her will, and that the witnesses, in the presence of the testatrix, at her request, and in the presence of each other, signed as witnesses.

SUFFICIENCY OF EVIDENCE OF EXECUTION OF WILL.

7. The evidence herein shows that decedent neither signed the will in question nor acknowledged its execution in the presence of subscribing witnesses.

EFFECT OF RECITALS IN ATTESTATION CLAUSE.

8. Where the memory of witnesses to a will is at fault in establishing the incidents attending the formal execution thereof, the attestation clause comes to the support of its validity, and the law will presume a due execution from the recitals therein of the requisite facts, but such recital cannot prevail against positive and convincing proof to the contrary.

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45 502

From Multnomah: ARTHUR L. FRAZER and MELVIN C. GEORGE, Judges, in joint session.

The will of Esther L. Mendenhall having been admitted to probate by the county court of Multnomah County, its validity was called in question, and the probate was revoked by W. M. Cake, then county judge. The executor appealed to the circuit court, where the decision of the county court was affirmed, and the executor again appeals. A motion to dismiss the last appeal was overruled, and on a consideration of the merits the decree was affirmed, both opinions being by Mr. Justice WOLVERTON.

MOTION OVERRULED: AFFIRMED.

ON MOTION TO DISMISS THE APPEAL.

Mr. Edward Mendenhall and Mr. Julius C. Moreland for the motion.

Mr. Martin L. Pipes, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

This cause originated in the county court, was appealed to the circuit court, and now an appeal is sought to be prosecuted to this court. What purported to be the last will and testament of Esther Louise Mendenhall was, upon the petition of Rush Mendenhall, who is nominated as executor therein, admitted to probate by the county court in common form. Subsequently E. and E. R. Mendenhall, the respondents herein, filed objections to the probate thereof, and the following named heirs and legatees, along with the executor, were cited to appear and show cause why the probate of said will should not be revoked, the will set aside and declared invalid, namely, Cyrus J. Mendenhall, E. J. Mendenhall, Hattie Mendenhall, and Lizzie C. Mendenhall. None of the last-named parties appeared, but the contest was carried on wholly between E. and E.

R. Mendenhall, as contestants, on the one side, and Rush Mendenhall, executor, as proponent, on the other. At the hearing the county court set the will aside, and in his attempt to appeal to the circuit court from such decree the proponent, on February 6, 1901, served a notice thereof upon the contestants only, directed to them and their attorney, and reciting "that the said Rush Mendenhall hereby appeals," etc., without designating himself as executor of the last will and testament of the testatrix. There was a motion to dismiss the appeal in the circuit court, which being overruled, the decree of the county court was affirmed after a hearing upon the merits. The respondents now move to dismiss the appeal to this court, upon the following grounds: (1) That the proponent prosecuted the appeal to the circuit court in his individual, and not in his representative, capacity as executor; (2) that the notice of appeal was not served upon all the heirs and legatees; and (3) that the entire testimony taken at the trial in the county court does not accompany the transcript.

1. The motion challenges the jurisdiction of this court to entertain the appeal (*Corder v. Speake*, 37 Or. 105, 51 Pac. 647), but presents no special reason why it has not been regularly perfected in the mode pointed out by statute. The first ground assigned is not of that character, but is directed rather to the merits of the controversy as presented to the circuit court, and should be a matter for our consideration upon a perfected appeal. Whether the question was raised or not by the motion made in the circuit court to dismiss the appeal from the county court, it could have been so raised, and was a matter for that court to pass upon primarily, whereupon it would become the province of this court to review and revise its adjudication with relation thereto; thus demonstrating that the question is one going to the merits of the controversy, and not

involving the regularity and efficacy of the appeal from the circuit court. So the first ground is not well taken.

2. The second is disposed of by the 1899 amendment of the statute (Laws 1899, pp. 227, 228), in force at the time the appeal to the circuit court was taken. Since the adoption of that amendment, and of another relative to the same subject (Laws 1901, p. 77), an appeal may be taken by serving a notice thereof on such adverse party or parties as have appeared in the action or suit: B. & C. Comp. § 549, subd. 1; *United States Invest. Corp. v. Portland Hospital*, 40 Or. 523 (64 Pac. 644). The statute has been literally observed in the present instance.

3. By the third and last ground urged for dismissal the question is presented whether or not certain testimony taken in the cause in the county court and lost was retaken or supplied, or the irregularity waived in that court. As we understand the record, all the testimony accompanies the transcript to this court that was before the county court at its final hearing upon the merits. It is plain, therefore, that the regularity of the appeal from the circuit court is not challenged by the question, and hence we cannot entertain it until we reach the cause upon its merits.

MOTION OVERRULED.

ON THE MERITS.

For appellant there was a brief over the names of *Schuyler C. Spencer* and *Pipes & Tift*, with an oral argument by *Mr. Spencer* and *Mr. Martin L. Pipes*.

For respondents there was a brief and an oral argument by *Mr. Julius C. Moreland* and *Mr. Edw. Mendenhall*.

MR. JUSTICE WOLVERTON delivered the opinion.

Esther Louise Mendenhall died March 29, 1898, leaving a writing bearing date November 19, 1897, purporting to be her last will and testament. It nominates the appel-

lant, who was her husband, as executor, giving him all her personal property except certain articles bequeathed to Elizabeth C. Mendenhall, a daughter of her son Elbert J., and the use of her real property during his life; to her sons Edward C. and Elgin R. one dollar each; to her son Cyrus J. it devises one third of her estate at her husband's death; to Elbert J., one third for the use and benefit of himself and family during his life, thereafter to be divided equally between his wife, Harriet, and their issue; and to her said granddaughter, Elizabeth C., the remaining one third. This instrument was admitted to probate by the county court of Multnomah County on the 5th day of May, 1898, and on December 6th following, the respondents filed a petition contesting it. As presented, the writing has subscribed thereto the name of Esther Louise Mendenhall, admittedly her genuine signature, and the names of Ed Dennison and Lizzie B. Dennison as subscribing witnesses. The date, "November 19th," and the words, "Portland, Oregon," appearing beneath the signature of each of these witnesses, are all in the handwriting of the testatrix. The year in which it was executed is indicated by the printed words, "in the year of our Lord, One Thousand, Eight Hundred and," followed by the written words, "Ninety-seven," in the handwriting of Elbert J. Mendenhall, referred to in the testimony as "Bert," who drew the will, using a printed form for the purpose. The attestation clause is all in print, except the name of the testatrix and the word "her," appearing in three places. The single point of controversy is whether the testatrix subscribed the instrument or acknowledged its execution in the presence of the subscribing witnesses; the contestants' contention being that her name was not appended thereto at the time the witnesses signed it, nor until a long time thereafter, and that when it was subscribed by her the witnesses were not present.

4. Preliminary to the consideration of this controversy,

we will examine the petition contesting the will, which is challenged as to its sufficiency to raise the question involved. It avers, among other things, "that the said paper admitted to probate as the will of said Esther Louise Mendenhall, deceased, is not the will of said decedent; that the same was not signed by her, nor was the same witnessed as by law required, or witnessed at all, in fact; that said paper was never executed as or for a will, and was never intended by said decedent to be her last will," etc. It is argued that the only language at all apt or competent for presenting the issue is this: "Nor was the same witnessed as by law required, or witnessed at all in fact;" that the first clause thereof states but a conclusion of law; and that the latter raises only the question whether the instrument had subscribing witnesses to it. The objection is technical, but, if meritorious, the proponent is entitled to have the benefit of it. The mode of proceeding in a case of contest of this nature is aptly developed in *Hubbard v. Hubbard*, 7 Or. 42, 44, where the court say: "It is claimed by counsel for appellants that where a will has been probated 'in common form,' or by proceedings wholly *ex parte*, as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to re-probate the same *de novo*, by original proof, in the same manner as if no probate thereof had been had. This proposition we think, is correct, if the allegations are sufficiently broad to question the validity of the will, and the competency of the proof as to its execution. In every such proceeding the *onus probandi* lies upon the party propounding the will, and he must prove every fact, which is not waived or admitted by the pleadings, necessary to authorize its probate in the county court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative." "This," says Mr.

Chief Justice THAYER, in *Luper v. Werts*, 19 Or. 122, 126 (23 Pac. 850, 852) "seems to be regarded as the proper rule upon the subject, and I believe it to be correct in principle."

5. This language implies that the allegations of the petition for contest must be sufficiently broad and specific to call in question the validity of the will, and the competency and sufficiency of the proof as to its execution. The petition may waive or admit necessary facts and formalities attending the probate, and good practice would suggest that it ought to point out with common perspicuity the specific features upon which reliance is placed for defeating the probate. As to all matters waived or admitted by the pleadings, it would seem that no additional proofs are necessary; but as to those brought in question by the petition the proponent has the burden of proof, and must establish them in the first instance.

6. The statute requires that a will shall be attested by two or more competent witnesses subscribing their names to the instrument in the presence of the testator: B. & C. Comp. § 5548. A subscribing witness must be something more than a person who subscribes his name as a witness to the writing. He must attest the signature of the testator, who must sign the will in his presence, or acknowledge to him by word or act that he had signed it: *Luper v. Werts*, 19 Or. 122, (23 Pac. 850). As we said in the case of *Skinner's Will*, 40 Or. 571, 583 (67 Pac. 951, 954): "The attestation, it is true, is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it. The witness must take cognizance of the signature of the person executing, either by seeing him write, or by his acknowledgment of it in some manner, either expressly or impliedly, so that he can be able to say surely and unequivocally that the signature to the instrument is that of the person exe-

cuting, previously appended. But the attestation of the will does not depend upon the memory of the attesting witness. The act is one, when once performed, which stands as an accomplished fact, and any subsequent failure of the memory of the witness, or willful purpose in suppressing what is known to have transpired, does not change or obliterate it. It may, perchance, stand unsubstantiated after applying the test of legal proof, but, if it once existed, it stands for all time as any other fact." With this idea of the signification of the term "witness," as applied to a will, it is not a wide stretch of the understanding to conclude that the pleader meant, by the averment that the will was not witnessed at all, that the purported signature of the testatrix was not attested by the subscribing witnesses. That the proponent so understood the language is indicated by the averment of his answer, wherein he states that the testatrix "then and there signed her name to the same, with her own hand, in the presence of Lizzie B. Dennison and Ed Dennison, both competent witnesses, to whom and in whose presence she then and there declared the same to be her last will and testament, and that she had signed the same, and that then and there, after her signature, the said Lizzie B. Dennison and Ed Dennison, and each of them, signed her and his name at the bottom of said will in the presence of said testatrix and at her request, and in the presence of each other, and duly attested the said will by their said signatures." We conclude, therefore, that the issue was sufficiently presented by the petition, and especially is it so in view of the answer of the proponent.

7. In July or August, 1897, the testatrix, as shown by the testimony of the executor, sent by him a pencil memorandum of a will, and also a letter, requesting Bert to copy the will and put it in proper form for execution. Bert, who was then living at Buxton, Washington County, complied with the request, using a blank printed form for

the purpose, specifying therein in his own handwriting the several bequests, and filling in the blanks with the requisite data. The blank left for the date of execution was not filled, nor was the residence of the witnesses indicated. In this form the executor carried it to the deceased within two or three weeks, being some time in the month of August. The executor further testifies that on the 19th day of November, 1897, at the noon hour, his wife, having the will as drawn up by Bert in her trunk, said, "I must have it signed, because I don't know what minute I am going to leave you;" that she unlocked the trunk, took the will out, and requested him to accompany her to the kitchen then occupied by the Dennisons, it being in the same building where the testatrix and executor were living, which he did; that she asked the Dennisons if they had a pen and ink, and told them that she wanted them to witness her signature to her will, saying, "I want to sign it in your presence;" that they sat right there, and she signed the will; that he (the executor) was standing right by, looking at her; that the witnesses both signed it, but he thinks the testatrix wrote "Portland"; that after the signing his wife took the will and put it back in her trunk; that it remained there until some three or four hours after her decease, when he obtained the key to the trunk, took it out, examined it, and retained it thereafter in his possession. He employed Elgin R. Mendenhall, called "Al" in the testimony, who is an attorney, to probate the will for him, paying him \$50 for his services. Al drew the petition looking to its probate, but declined to swear him to it, whereupon the executor took it to C. A. Reed, who administered the oath, and on May 5th it was admitted to probate upon the testimony of the subscribing witnesses and the executor. The formal testimony of Lizzie B. Denison, as shown by her affidavit contained in the record, is to the effect that the instrument was signed by her about

three or four months prior to the time of their examination, April 5, 1898; that the said Esther Louise Mendenhall presented a paper to her, and asked her to sign it as a witness, remarking at the time that it was her will; that she (the witness) signed her name thereto, but that she never read the paper or noticed any writing upon it; that she did not know the age of the deceased when she died, but that she was over the age of twenty-one years when she signed the will; that she (the witness) signed in the presence of the deceased and in the presence of the other subscribing witness. Ed Dennison's formal testimony is to the same effect.

The executor deposed as follows: "I was the husband of deceased at the time of her death, and knew her handwriting; that the signature, viz., Esther Louise Mendenhall, to the instrument purporting to be the last will of deceased, which is now shown me, is in the handwriting of my said wife." This proof was reduced to form by the attorney, but was corrected by Judge Northup in the particular whereby it is shown that the testatrix was above the age of twenty-one years when she "signed," or, as said in Ed Dennison's proof, "made," the will. Judge Northup, who was presiding, testifies that he, at the request of the attorney, examined the witnesses orally; that he must have asked the subscribing witnesses whether Mrs. Mendenhall's name was subscribed to the will at the time they subjoined theirs, and that they answered in the affirmative, although it was not written at the time; that his recollection is that Mrs. Dennison stated that Mrs. Mendenhall did not sit down at all, but was standing in the room during the whole time, and that Dennison made in substance the same statement, but that witness had no distinct memory upon the subject; that he thought the oral testimony of the executor was in substance as contained in his affidavit or formal proof; and that the taking of his testimony was

suggested by witness because the other witnesses had not said that the signature attached to the will was that of the testatrix at the time of their signing. Lizzie B. Dennison testifies in this proceeding that the testatrix brought the will into their kitchen while they were eating, and handed it to Mr. Dennison; that witness procured a pen and ink from their bedroom for him, and he signed it; that testatrix requested him to sign, and that witness then signed it, also at her request; that she said it was her will; that they signed in her presence and in the presence of each other; that, after they signed, witness gave the will back to her, and she went out; that when she gave the paper to Dennison it was partially folded, and witness did not see her name at all; that she did not pay any attention to the paper; that part of the paper was printed, and that she did not see any written word that she could remember; that she did not read any of the printed matter of the attestation clause; that she could not say whether the clause was on the will or not; that Mrs. Mendenhall did not sign the will in her presence or in the presence of Mr. Dennison, and that she did not testify previously before the county court that testatrix signed in her presence, nor did she testify that Mrs. Mendendall acknowledged to her that the name now appended was her signature; that there was nothing said about her name; that she testified at the former examination at the request either of Al or Rush Mendenhall—probably Al; that Mr. Rush Mendenhall was not in the room when she signed her name to the paper as a witness; that there was no one in the room at the time but her husband, the testatrix, and herself; that the little girl, Lizzie Mendenhall, came in some time after Mrs. Mendenhall went out; that Mrs. Mendenhall came back in the room shortly after, and talked to her about the will, and said she wanted to get it made out and put away before Mr. Mendenhall, the old gentleman, came back;

that she gave no reason for so doing, only that he had been trying to find out if she made it (the will) or not; that witness signed the paper some time before Christmas, three or four months before the old lady died; that Rush Mendenhall was not in the city at the time, but came back in two or three days or a week; that the words "Portland, Oregon," are neither in her handwriting or her husband's, and she does not remember whether those words were there when she signed, or not, and that she did not remember seeing any signature to the purported will at the time.

Mr. Dennison testifies substantially the same as his wife, except as to matters that took place between Mrs. Dennison and the testatrix after she left the room where they signed the will; that Mrs. Mendenhall said, "'I have got a piece of paper here I want you to sign,' and I says, 'What is it?' and she said it was her will, and she handed it to me, and I says, 'Where shall I sign?' and she says, 'Right here,' and she pointed out the line where I should sign, and I signed my name. * * I wrote my name, and my wife also;" that the words "Portland, Oregon," were not there when he signed; that the testatrix did not have the pen in her hand to write with, and that he wrote his name with the pen, and then handed it to his wife; that he did not see any writing on the paper, it being folded about half; that there was not another person in the room except the three when he signed; that he did not read the attestation clause; that he was going to sign on another line, and the testatrix told him not to sign there, because she wanted to sign there herself; and that he did not see her name where it is signed now. Elgin R. Mendenhall testifies, in brief, that the first time he saw the alleged will was when he lived on Third Street, in the early part of 1898, either the latter part of January or the early part of February; that his mother brought it to him; that the words "November 19th," his mother's signature, and the words "Portland, Oregon,"

appearing twice, were not there, but that the names Ed Dennison and Lizzie B. Dennison were ; that she had prepared another will on letter paper, which was filled out, signed by her, and witnessed ; that the difference between the two instruments was that witness was included in the latter and not in the former ; that she said she would not sign the former because he was not so included ; that his father employed him to probate the pretended will, and gave him \$50 for it, but that he had an understanding with him at the same time that he was to pay him in money or deed him property equivalent in value to a one-third interest in his mother's estate, and that Ed was to give the old gentleman a deed to whatever interest he may have in such estate, and that, depending upon this agreement of his father, he procured the will to be probated ; that he declined to swear his father to the petition for probate, and that he had it done by Reed ; that he prepared the affidavits for the witnesses and for his father, being the formal proof of the will ; that his father told him that he never saw the testatrix sign the will, but that he knew the signature was in her handwriting ; that his father did not keep his agreement with him to give him money or property equivalent to the third interest in his mother's estate ; that he subsequently proposed making a will by which he intended giving him that amount, which would have been satisfactory to witness, but he ascertained he was going to disinherit Cyrus J., commonly called "Doc," and witness would not assent to that, and thereupon his father declined to do anything, which precipitated the present litigation to defeat the will.

Ed Mendenhall testifies that the first time he saw the purported will his mother's signature was not attached, nor were the words and figures "November 19th," or "Portland, Oregon," but that the witnesses' names were subscribed to the attestation clause ; that this was early in the year 1898 ;

that his mother showed the will to him in the front room, next her bedroom; that she brought it to him, and said that Al was not mentioned, and that she had not signed it, and did not want to do so; that he saw her shortly afterward, and she had prepared a will herself, providing for Al, which she had signed, and which was regularly witnessed; and that, in a conversation relating to the purported will, his father told him that he did not see his mother sign the instrument. This recounts in a brief way the most material evidence in the record relative to the sole question left for our determination, which is one purely of fact: Did the testatrix sign the will in the presence of the attesting witnesses, or acknowledge to them, either expressly or impliedly, that the signature, "Esther Louise Mendenhall," if not subscribed at the time, was hers, previously written? If either act was in reality performed in the manner suggested, which must be determined from the evidence in the record, the will should be admitted to probate; otherwise not.

The executor's testimony as to the execution of the will is proof positive that the testatrix signed the will in the presence of the attesting witnesses, and the attestation clause subscribed by the witnesses asserts as much. Aside from these two circumstances, the testimony in the main has an exactly opposite bearing. The two subscribing witnesses say with emphasis that the testatrix did not write her name to the will at the time, and that the old gentleman was not in the room; that no one but the testatrix and the two witnesses was present, and consequently the executor could not have seen his wife sign the paper. In this testimony they are not discredited by their formal proofs. Again, the two sons, Al and Ed, both testify that their mother showed them the will and discussed its provisions with them after the witnesses had signed, and that their mother's name was not appended at the time. With

them, as with the subscribing witnesses relative to her signing in their presence, there is scarcely any room for mistake. The matters of detail are stated with clearness and precision. Added thereto is another feature. It seems probable, upon an examination of the different signatures, that the ink used by the testatrix is of a slightly different shade from that used by the witnesses, indicating that she did not sign with the same ink. But we do not consider this of great weight, as there is so much liability of mistake about it. These proofs have a direct bearing upon the vital issue as to whether the testatrix signed the will in the presence of the attesting witnesses. Collaterally, both Al and Ed swear that the old gentleman told them he did not see their mother sign the will. This finds strong corroboration in the circumstance that the father's first proof when the instrument was originally presented for probate spoke merely to his knowledge of the identity of her handwriting or signature, without so much as intimating that he saw her sign. Then it is very probable that he made such a contract with Al to induce him to assist in probating the will as Al declares he made. He admits in his testimony that Ed informed him that he had prepared and executed a deed to him such as was contemplated by the agreement, and that he had Reed draw his will providing for Al, but not for Doc, and that he and Al disagreed about that. Beyond this, the old gentleman evinced an active interest relative to the will. Within three or four hours after his wife's death he searched for and found it in her-trunk, examined it, and kept it in his pocket from that time on; nor would he let Ed take it into his hands at any time. Other matters might be alluded to, such as the strained relations of the parties concerned, which inferentially give weight to these observations, and militate against the executor's contention. The positive assertion of the executor that he saw his wife sign is unquestionably

overborne by the direct testimony of the subscribing witnesses and his sons Al and Ed. There is not the remotest reason for believing that his testimony outweighs that of the four, while, upon the other hand, every circumstance and consideration gives strength and potency to the contention that she did not so sign in the presence of the witnesses. The attestation clause cannot elucidate this feature of the controversy, as both the subscribing witnesses remember distinctly concerning the subject, and speak positively as to the fact. Neither was the signature of the testatrix affixed before the signing by the witnesses. While the testimony of Mr. and Mrs. Dennison is somewhat indefinite in their assertion that they did not see her signature, in that they did not assert explicitly that the signature was not there, Ed and Al Mendenhall testify directly to the fact that it was not there some time afterward; hence it could not have been there when they signed.

8. Where the memory of witnesses is at fault in establishing a real or necessary incident attending the formal execution of a will, the attestation clause comes to the support of its validity, and the law will presume a due execution from the recitation of the requisite facts therein, or even without it, upon the hypothesis that the requirements of the law have been duly observed: *Skinner's Will*, 40 Or. 571 (67 Pac. 951), *Thompson v. Owen*, 174 Ill. 229 (51 N. E. 1046, 45 L. R. A. 682). But it is not effective as against positive and convincing proof to the contrary. The fact that the testatrix declared the instrument to be her will, together with the attestation clause, would have gone far, if possibly it would not have been sufficient, as against the ambiguous statement of the subscribing witnesses, to substantiate a formal execution by an acknowledgment of her signature (*Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A.

701), had it not been for the other proofs adduced, showing that the signature could not have been there at the time; and, not being then subscribed, there could by no dexterity of reasoning have been an acknowledgment thereof to the witnesses present. We have not overlooked Judge Northup's testimony; but, while he thinks the Dennisons must have testified that the testatrix acknowledged her signature to them, or he would not have admitted the will to probate, he nevertheless could not say from his memory upon the subject whether such was the case or not. The fact, however, that he thought it was necessary to have the old gentleman called for the purpose of identifying the handwriting of his wife, thereby showing it to be her genuine signature, is a strong circumstance tending to show that they had not sufficiently established a proper attestation without such proof, but that with it a *prima facie* case had been made, and in this view his judgment would appear to be sound. The further testimony adduced upon this trial, however, bears so strongly the other way as to impel us irresistibly to the conclusion that the will was neither signed nor the testatrix's signature acknowledged in the presence of the subscribing witnesses, and therefore that it was not, as a matter of fact, attested as by law required.

AFFIRMED.

Decided 8 August, 1906.

BACKHAUS v. BUELLS.

[72 Pac. 976, 73 Pac. 342.]

APPEAL—STATUTES—MEANING OF "TRANSCRIPT."

1. The word "transcript," as used in Section 558, B. & C. Comp., providing that the appellant shall file a "transcript," or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligently present the questions to be decided, does not now mean a copy of the judgment roll as it did before the amendment of 1899 (Laws 1899, p. 229), but rather a fair synopsis of the proceedings in the trial court relative to the questions reserved by appellant for further consideration. The transcript must be correct as to the matters involved, and sufficiently complete not to be misleading. It need not present the record as to matters relied upon by the respondent, the latter being protected by the right to ask for an additional record, under section 554.

43	558
43	598
43	614
43	558
46	212

REPLEVIN FOR UNSEGREGATED PART OF A LARGER MASS.

2. Where something remains to be done in preparing a chattel for delivery in pursuance of an executory contract of sale and purchase, as, in caring for a growing crop, selecting the part to be delivered and packing it for shipment, title thereto does not pass either on the signing of the contract, or on a breach of it, unless specially so provided. For instance, where a contract for the sale of a hop crop requires the seller to segregate the quantity of hops to be delivered, and put them into the condition required for acceptance, the performance of the labor necessary to the preparation of the hops for delivery is a condition precedent to the vesting of title in the buyer, in the absence of any contrary statement in the contract, and hence the contract does not pass a title sufficient to enable the buyer to maintain replevin.

CHATTEL MORTGAGE FOR FUTURE ADVANCES—TACKING DEBTS.

3. The future advances ordinarily contemplated by a mortgage security are such as may be made by the mortgagee himself, and, unless particularly provided for, the latter cannot enforce the mortgage for debts due by the mortgagor to others and assigned to him.

CHATTEL MORTGAGE—RIGHT TO POSSESSION—UNLIQUIDATED DAMAGES.

4. Upon a breach of the condition of a chattel mortgage the mortgagee is entitled to possession of the pledged property to apply it to the satisfaction of his debt, either by legal process or in the manner provided in the mortgage, but in both cases the amount of the obligation must be fixed. This case well illustrates the justice of such a construction of the respective rights of the parties to a chattel mortgage: A contract of purchase and sale having contained a hypothecation of its subject-matter as security for such damages as the buyer might sustain through the seller's failure to perform his part of the contract, the buyer is not entitled to possession of the property, upon a breach by the seller, unless the amount of his damage has been in some way ascertained; and the result is the same whether the possession is claimed under Section 5636 or Section 5637 of B. & C. Comp.

REPLEVIN BY MORTGAGEE—DUTY AS TO FORECLOSING.

5. After a mortgagee or other lien claimant of personal property has secured possession thereof by right of the lien, he must proceed with reasonable promptness to foreclose—he will not be permitted to hold it indefinitely, thus treating it as his own: *Case T. Mach. Co. v. Campbell*, 14 Or. 490, overruled on this point.

MATERIAL AND IMMATERIAL EVIDENCE.

6. Where, in an action of replevin, if plaintiff was entitled to recover, it was on the theory that a contract security in the nature of a chattel mortgage conferred such right upon a breach of the conditions thereof, and he could not have secured such possession under the executory contract of sale, evidence that the buyer had tendered to the seller certain funds under the terms of the contract was immaterial.

From Marion: GEORGE H. BURNETT, Judge.

This is an action of replevin for hops, and resulted in a judgment for defendant, from which plaintiff appeals. A motion to dismiss the appeal for want of a proper record was overruled, the opinion being written by Mr. Justice WOLVERTON. Subsequently the case was heard on the merits of the appeal, and affirmed in an opinion by Mr. Chief Justice MOORE.

MOTION OVERRULED: AFFIRMED.

ON MOTION TO DISMISS THE APPEAL.

Mr. George G. Bingham for the motion.

Mr. Carey F. Martin, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a motion to dismiss the appeal herein, because certain exhibits, designated B, C, D, E, and F, which are attached to and made a part of defendants' third and separate defense, are not contained either in the abstract or any transcript filed in this court. The purpose of the defense referred to was to set up a former adjudication, and these exhibits are copies of the complaint, answer, reply, motion for judgment, and judgment, in the first action. There was a motion interposed by defendants in the present cause for judgment on the pleadings, which was overruled by the trial court. In this ruling defendants insist that the court erred, and it is argued that because the exhibits referred to are omitted from the abstract they are unable to present the question here. It is manifest that if the motion for judgment was well taken the cause should have been finally concluded in defendants' favor, unless, through a proper exercise of the discretion of the trial court, some amendment was allowed by which to remedy the defect, and that without the missing record the defendants' assignment of error on the appeal cannot avail them on the trial of the cause here. The respondents are doubtless entitled to have this additional record here, and the question presented is who of the parties litigant should bring it up.

1. The respondents rely upon Section 554, B. & C. Comp., to sustain their position, which reads: "When it appears by affidavit to the satisfaction of the court that the transcript is incomplete in any particular substantially affecting the merits of the judgment or decree appealed from, on motion of the respondent the court shall make a rule

upon the clerk of the court below, requiring him to certify as to such alleged omission, and if true, to transmit to the appellate court a certified copy of the pleading, entry, order, or other paper omitted in the transcript; or, in such case, the respondent may move to dismiss the appeal, and the court shall allow such motion unless, on the cross motion of the appellant, it makes a rule upon the clerk concerning such omission, as provided in this section, upon such terms as may be just." The appellant insists that he has complied with the statute in bringing up so much of the record as will present the errors upon which he relies for a reversal of the judgment, and refers to Section 553, B. & C. Comp., to sustain his position. This section reads: "Upon the appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligently present the questions to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and the undertaking on appeal."

It would seem that appellant has brought himself clearly within the purview of this latter section, as he has filed here an abstract of the record, sufficient to present the errors relied upon by him for reversal of the judgment, together with a copy of the judgment appealed from, the notice of appeal, and the undertaking, with proof of service of such notice and undertaking. The rules of the court concerning the abstract require that the appellant shall serve upon an attorney for each respondent a printed copy of so much of the record prepared as therein provided as may be necessary to a full understanding of the questions presented for decision, and file with the clerk of this court

proof of such service, etc. (Rule 4, 35 Or. 587, 591, 37 Pac. vi); and the form thereof is prescribed (Rule 9, 35 Or. 587, 595, 37 Pac. vii). It is also provided that, if the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk twelve, printed copies of such further or additional abstract, as he shall deem necessary to a full understanding of the questions involved in the appeal: Rule 5, 35 Or. 587, 593 (37 Pac. vi). Section 554 was enacted with a view of affording the respondent a remedy where the appellant failed to bring up such a transcript as was then provided by the preceding section, which has since been amended, and is now section 553. The transcript, as defined by subdivision 1, was to be a copy of the judgment roll or final record, etc. In its present or amended form it merely provides that the appellant may file a transcript or such an abstract as the rules of the appellate court may require of so much of the record as may be necessary to present intelligently the questions to be decided. So that the term "transcript," as it relates to the appeal, has been given a modified or different signification from that which originally obtained. Instead of being a copy of the judgment roll or final record it is now a certified copy of so much of the record as may be necessary to present intelligently the questions to be decided, which, as well as the abstract, must be accompanied with a copy of the judgment or decree appealed from, notice of appeal, etc. So that section 554 must now be interpreted with a view to its application to the new act relating to the transcript. The transcript and abstract are now, in substance, the same. The former, however, comes under a certificate of the clerk of the court, while the latter is prepared from the record by the party appealing. If a transcript has been adopted for effectuating the appeal, and it appears that it is incomplete in any particular affect-

ing the merits of the judgment or decree appealed from, the respondent may have the motion to dismiss, as employed in the present case. But, if the appellant has brought here such a transcript as is required by the preceding section, nothing more can be exacted of him, and the respondent should supply the missing record, if it is desired to present other questions upon his part in defense of the appeal.

Of course, if the transcript brought up by the appellant for the presentation of the questions relied upon by him for a reversal is incomplete and misleading, so as to present a false issue, then it must be admitted that the additional record ought to be at his expense. But it is otherwise where he has complied with the law, and where the respondent desires to present additional questions, and finds the record as exhibited by the transcript not full enough for that purpose. He must now bring that additional record here. The appellant cannot be expected to anticipate questions upon which the respondent may desire to insist, hence he could not be called upon to bring a record sufficient in all respects for that purpose. The rules of the court concerning the abstract were revised since the amendment of section 553, and proceed upon this principle, and may be fitly adopted as a proper interpretation of section 554, as it relates to the transcript. The appellant is therefore required to bring the record here by transcript or through the instrumentality of an abstract. In doing this, it is only necessary for him to incorporate therein such portions as will set forth intelligently the questions upon which he relies for a reversal. He must not present a garbled record or one that would show a different state of facts from that really existing, but must bring such parts of the real record as may be necessary to a full understanding of the questions presented for decision. When this has been done, the respondent must

do the rest if he desires to present other issues deemed important for his defense to the appeal.

The motion to dismiss will therefore be denied, and the respondent may have a rule upon the clerk of the trial court requiring him to complete the record in the particulars suggested.

MOTION OVERRULED.

ON THE MERITS.

This action was begun November 5, 1902, by A. F. Backhaus against F. W. Buells, J. Wolford, and Archie Wolford, partners, as J. Wolford & Co., Wm. Brown, and others unknown, partners as Wm. Brown & Co., to recover the possession of 44 bales of hops, weighing 9,884 pounds, or \$2,423, the value thereof, in case delivery could not be had, and \$1,500 for the alleged wrongful detention of the same. The cause of action had its inception in the following contract:

"This instrument, Made and entered into this 17th day of March, 1902, between F. W. Buells, by occupation a farmer, of the County of Marion, State of Oregon, the party of the first part, and A. F. Backhaus or Agt., party of the second part, witnesseth:

That party of the first part does hereby agree to raise and sell, and does hereby sell and agree to deliver, to said party of the second part his successors or assigns (10,000) pounds (net) of hops crop of hops now being, standing, growing or to be grown on farm owned by F. W. Buells, situate about three miles east of Silverton, County of Marion, State of Oregon, and consisting of 54 acres, more or less, on which land there is now growing, or under cultivation 9½ acres of hops, and described as follows: Bounded by lands owned or possessed by the following-named persons: On the north by D. Leonard, on the east by A. Wolf, on the south by Coolidge and McClain, on the west by Tucker; said hops to be the growth of the year 1902, and to be choice quality, sound condition, bright uniform color, fully matured, free from mould and from damage by vermin,

cleanly picked, well dried and cured, and put up in good merchantable order and condition, in new 24-ounce bale cloth, in bales of 185 to 200 lbs. each, gross weight (tare 7 pounds per bale). The said hops not to be the production of the first year's planting. All of said hops to be delivered to said party of the second part, his successors or assigns, in entire lot f. o. b. cars at Silverton, between Oct. first and October 30.

The party of the first part agrees to serve notice in writing upon the party of the second part at least 10 days before the day on which he proposes to tender delivery of said hops; but said notice shall not be sent until the entire lot is actually in bale and ready for delivery. And the said party of the first part further agrees that this contract has preference, both as to quality and quantity, over all other contracts made hereafter by persons in relation to said hops, and that the party of the second part may at any time, and until the full performance of this agreement, have free access to the above-described premises or any other premises where such hops may be.

The party of the second part agrees to pay the party of the first part, by checks, at the rate of (12) cents per pound therefor, in the manner following to wit: One (1.00) Dollars, at the time of signing hereof, the receipt whereof is hereby acknowledged, and that to enable the party of the first part to harvest said crop and prepare the same for market in the manner in which the party of the first part agrees to harvest and prepare the same will advance and loan to the party of the first part at or during picking time, as the same may be actually required to defray expenses of picking such hops, and of harvesting and curing the same, and for such purposes only, not exceeding, however, five cents for each pound of hops which may be grown on said lands, and which are by this agreement to them bargained and sold, and not exceeding \$500, in all and the balance when said hops are delivered and accepted.

If the quality of said hops shall be inferior to hops above called for, the said party shall have the privilege of taking them, and reduction shall be made in price equal to the difference in value between such hops and those above called for.

It is expressly understood and agreed that advances are to be made only, if in the judgment of the party of the second part, the hop crop is in a condition that hops of the quality as above stipulated can be delivered.

And the party of the first part hereby conveys and mortgages to the party of the second part, his successors or assigns, all the crop of hops grown or to be grown on the premises hereinbefore described during the year 1902, as security for the payment of all advances and loans, which shall not exceed in the aggregate \$500 and interest thereon, made hereunder, and as security for the faithful performance on the part of said party of the first part of the foregoing obligations, and of all agreements and covenants on the part of said party of the first part hereinbefore mentioned, and as security for the payment of any damages said second party his successors or assigns may sustain by reason of any failure on the part of said party of the first part to faithfully perform and carry out the agreements, covenants and obligations hereinbefore set forth and mentioned; and also all other obligations existing or that may be entered into by the parties hereto during the life of this contract.

Any insurance on said hops shall be for the benefit of said second party, and said second party may keep the hops insured for their full value from the time said hops are picked until delivery, at the expense of said first party, and deduct the expense of insurance from purchase price above agreed.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above mentioned.

Executed in the presence of:

G. W. Dolan,

J. K. Buff.

F. W. BUELLS, [Seal.]

A. F. BACKHAUS, [Seal.]

By T. E. BLAKELY, [Seal.]

State of Oregon, County of Marion—ss.: On this 17th day of March, A. D. 1902, personally came before me G. W. Dolan, a Notary Public in and for said County, the within named F. W. Buells, to me personally known to be the identical person described in and who executed the within instrument, and acknowledged to me that he exe-

cuted the same freely for the uses and purposes therein named.

Witness my hand and seal this 17th
day of March, A. D. 1902.

++++++
+ Notarial +
+ Seal. +
++++++

G. W. DOLAN,
Notary Public.

State of Oregon, County of Marion — ss.: I, F. W. Buells, being first duly sworn, on oath depose and say that the foregoing instrument is made in good faith, and without any design to hinder, delay or defraud creditors, and that the said crop of hops in the within instrument described, is the property of affiant, and is not encumbered except as to the within instrument.

F. W. BUELLS.

Taken, sworn to and subscribed before me G. W. Dolan, a Notary Public in and for said County and State this 17th day of March, 1902.

++++++
+ Notarial +
+ Seal. +
++++++

G. W. DOLAN,
Notary Public."

The hops grown by Buells on said land in 1902 not having been delivered as provided for in the contract, this action was commenced, the complaint being in the usual form; and thereafter, the plaintiff having made the proper affidavit and given the necessary undertaking, the sheriff of said county took possession of the hops and delivered them to the plaintiff, who shipped them out of the state. The answer of Buells and Wm. Brown, doing business as Wm. Brown & Co., having denied the material allegations of the complaint, averred, for a first separate defense, that Buells was the owner of the hops, which were of the value of \$3,000, that he was in the possession thereof until they were wrongfully taken from him by the sheriff at plaintiff's instance, whereby he had been damaged in the sum of \$1,000, and that the defendant J. Wolford, doing business as J. Wolford & Co., was a warehouseman with whom the hops had been stored, but that he had no interest therein. For a second defense, it is alleged that Buells entered into

an executory contract of sale, by the terms of which plaintiff agreed to advance and loan him during the picking season such sums of money as he might need to defray the expense of harvesting the crop, not exceeding 5 cents per pound; that after commencing to pick the hops he required money for that purpose, and so informed the plaintiff, who notified him that he would not advance any sum therefor, whereupon the contract was by mutual consent rescinded, and Buells tendered to plaintiff \$1, the amount received by him on account of the contract, and interest thereon, but, the plaintiff refusing to accept the same, the money was deposited with the clerk for him. For a further defense it is alleged that Brown & Co. never had any interest in or possession of said hops, and disclaimed all right thereto. The answer demands judgment for Buells in the sum of \$3,000, the alleged value of the hops, and \$1,000 as damages for their detention. The reply, having denied the material allegations of the answer, avers that the hops were not a choice quality or cleanly picked, but were, by Buells' direction, gathered with leaves and stems, notwithstanding which plaintiff elected to take them and to pay therefor the contract price, and so notified Buells, who refused to deliver them and repudiated the contract. The reply admits that Buells tendered \$1.10 to plaintiff, but further avers that the latter's special agent, T. E. Blakely, advanced to Buells on account of the hops \$8 April 8, 1902, and \$10 June 30th of that year, no part of which sums has been repaid or tendered; that plaintiff fully performed his part of the contract, and tendered \$1,200, the purchase price of the hops, to Buells, who having refused to accept the same, said sum was deposited with the clerk for him. A trial being had, it resulted in a judgment for Buells, to the effect that he was the owner of the hops and entitled to the immediate possession thereof, and that he recover \$40.77, as damages for their wrongful

detention, but, if possession of the hops could not be had, that he recover the sum of \$2,500, the value thereof, and the plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. B. F. Bonham* and *Mr. Carey F. Martin*.

For respondent there was a brief and an oral argument by *Mr. L. J. Adams* and *Mr. Geo. G. Bingham*.

MR. CHIEF JUSTICE MOORE, after stating the facts as above, delivered the opinion of the court.

2. It is contended by plaintiff's counsel that under the contract of sale, and also as a consequence of a breach of the conditions of the chattel mortgage, their client was the owner of the hops, and after October 30, 1902, entitled to the possession thereof, and hence the court erred in charging the jury to return a verdict for Buells. It will be remembered that the contract was entered into by the parties March 17, 1902, and relates to a crop of hops to be grown that year, cleanly picked, well dried, and put up in good, merchantable order, in bales of specified weight, and delivered prior to October 30, 1902. By the terms of the contract, Buells was required to segregate the quantity of hops to be delivered, and put them into a condition for acceptance, thus, in the absence of any statement in the contract evidencing a contrary intention, showing only an executory contract of sale; and the labor necessary to their preparation for delivery was a condition precedent to vesting a title in the plaintiff. For a failure on Buells' part to comply with the terms of the agreement, no doubt, Backhaus could have maintained an action to recover the damages sustained in consequence of the breach; but, no title or right of possession having passed by such contract, whatever the rule may be elsewhere, it is settled in this state that replevin will not lie to recover possession of personal property under such circumstances: *Hubler v. Gas-*

ton, 9 Or. 66 (42 Am. Rep. 794); *Rosenthal v. Kahn*, 19 Or. 571 (24 Pac. 989); *Hamilton v. Gordon*, 22 Or. 557 (30 Pac. 495); *Faber v. Hougham*, 36 Or. 428 (59 Pac. 547, 1111). The plaintiff's right to recover the possession of the hops cannot, therefore, rest upon the executory contract for the sale thereof.

3. By the terms of the contract, Buells evidently mortgaged to Backhaus the crop of hops as security for the payment of all advances and loans; and no doubt can be entertained that, as between the parties, a lien was thereby intended to be created and impressed upon the property as security for the sums of money loaned or advanced on the faith thereof: *Nicklin v. Betts Spring Co.* 11 Or. 406 (5 Pac. 51, 50 Am. Rep. 477). Buells acknowledges the receipt of one dollar, and the pleadings admit that "long prior to the commencement of this action," said sum and interest were tendered to Backhaus; but his counsel contend that the testimony shows that Buells secured from plaintiff on account of the hops the further sum of \$18, which not having been repaid or tendered, the latter was entitled to the possession of the hops, and, this being so, the court erred in charging the jury as hereinbefore stated. Whenever the condition of any chattel mortgage is broken, the mortgagee is entitled to the immediate possession of the mortgaged property; and, if it is not delivered to him upon demand he may recover it in an action for the possession thereof: B. & C. Comp. §§ 284, 5636. Any party having an interest in personal property, coupled with a right to the immediate possession thereof, acquires such an ownership as entitles him to invoke the remedy that said action affords: *Case Threshing Mach. Co. v. Campbell*, 14 Or. 460 (13 Pac. 324); *Marquam v. Sengfelder*, 24 Or. 2 (32 Pac. 676); *Kimball v. Redfield*, 33 Or. 292 (54 Pac. 216); *Reinstein v. Roberts*, 34 Or. 87 (55 Pac. 90, 75 Am. St. Rep. 564); *Mayes v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319).

It is argued that Buells having secured, on account of the hops, the loan of some money from plaintiff's agent, which his principal ratified, made the loan that of Backhaus, thereby entitling him to the possession of the hops upon Buells' failure to repay or tender the money prior to October 30, 1902. T. E. Blakely, who, acting for plaintiff, secured the contract in question, appearing as his witness, testified in relation to a part of said loan as follows: "Well, I think it was on the 7th day of April I met Mr. Buells on the sidewalk. He says: 'Can you let me have a little money on my hops?' I told him that Mr. Backhaus had not made any arrangements with me about advancing any money on the hops, and he says to me: 'You will be perfectly safe. You will have the hops in your hands, and I need a little money pretty bad.' 'How much do you need?' I said to him, and he said, '\$8.' Then I told him I would let him have it, and done so. That is about all the conversation we had in regard to money matters, but the hops were talked about there at the same time." "Ratification," says Mr. Clark in his work on Contracts (section 303), "is where a person adopts a contract made on his behalf by another without authority, and it is governed by the following rules: (a) The agent must have contracted as agent, and not on his own account." An examination of Blakely's testimony shows that he did not loan the money as agent, but on his own account; and consequently the transaction could not be ratified by the plaintiff, not being made in his behalf. A valid chattel mortgage may be given to secure future advances (*Hendrix v. Gore*, 8 Or. 406; *Nicklin v. Betts Spring Co.* 11 Or. 406 5 Pac. 51, 50 Am. Rep. 477; *Sabin v. Columbia Fuel Co.* 25 Or. 15, 34 Pac. 692, 42 Am. St. Rep. 756); but if none are made thereunder, no lien attaches to the property described therein: *Coffin v. Taylor*, 16 Or. 375 (18 Pac. 638). The contract having been entered into to secure future advances to be made by Back-

haus, he could not take an assignment of any debts that Buells owed, and tack them to his mortgage, so as to make them a lien upon the property, without some stipulation to that effect: *Barthell v. Syverson*, 54 Iowa 160 (6 N. W. 178). And hence the plaintiff was not entitled to the possession of the hops by reason of Buells' failure to pay or tender the money so loaned by Blakely.

4. It is maintained by plaintiff's counsel that, Buells having mortgaged the hops as security for the faithful performance of his part of the contract, for a breach thereof plaintiff was entitled to the possession of the property, and, this being so, the court erred in giving the instruction complained of. "To constitute a mortgage," says Mr. Jones in his work on Mortgages (4 ed.), § 70, "there must necessarily be a debt which is the subject of the security." Such consideration may consist of an antecedent or a present obligation, future advances, indemnity against liability incurred, stipulations for the support and maintenance of a person, or agreements for the performance of any other duty. A covenant in a deed providing for the support of a person or for the performance of a duty, the damages for the breach of which are unliquidated, was originally regarded as not strictly constituting a mortgage, but the more recent cases are to the effect that a conveyance conditioned for the performance of a contract is a mortgage: Jones, Mortgages (4 ed.), § 388. To reach such a conclusion, however, it must necessarily follow that the duty to be performed, the damages for a breach of which are unliquidated, is capable of being reduced to a money value, either by an agreement of the parties, or by some appropriate judicial proceeding; thus constituting a debt, the payment of which is, in effect, secured. Applying this interpretation to the contract under consideration, it is susceptible of being construed as two instruments—the first, constituting an executory agreement for the sale of hops;

and the second, their hypothecation as security for any damages that Backhaus might sustain by reason of Buells' failure or refusal to keep or perform his part of the agreement. To disregard the debt as a consideration for the mortgage, and to hold that the security was given for the faithful performance of Buells' part of the executory agreement, would be to answer in the affirmative an inquiry propounded by Mr. Justice COOLEY, concerning a mortgagee of personal property, in *Fowler v. Hoffman*, 31 Mich. 215, in which he asks: "Is he to be his own judge, as well as officer; first assessing his own damages, and then seizing and selling the property to satisfy them?" In that case, which was also an action of replevin, the plaintiff sought to recover possession of the presses and material of a newspaper, in consequence of the breach of a clause in a chattel mortgage which provided that he was to have the full and free use of one half column of said paper during the term of five years for advertising purposes and for the publication of reading matter, and also because of the breach of another provision of the instrument which was to the effect that the mortgagors would not use the columns of the paper, or permit them to be used, to publish matter detrimental to the plaintiff, his reputation or business. It was held that the latter clause was too vague, uncertain, and indefinite to constitute the basis of a mortgage lien enforceable by power of sale.

In the case at bar, if Buells did not raise the prescribed quantity of hops, or if they were not of the specified quality, or if they were not picked, dried or baled in the manner indicated, and Backhaus, in consequence thereof, is to be the sole judge in his own case of the penalty he would demand for a violation of the terms of the executory agreement, the measure of his exaction might be difficult of ascertainment until he had manifested it by settling with Buells. If Backhaus is to exercise a right to take the hops

on account of the refusal to deliver them, he could also secure the possession thereof because of a breach of the conditions adverted to, for, if the security extends to one clause of the executory agreement, it necessarily goes to each. If Buells failed to raise 10,000 pounds of hops of the specified quality, or neglected to pick, dry, or bale them, or refused to deliver them as he had agreed, Backhaus was entitled to recover from him the damages he had sustained, which would be the difference between the market value on October 30, 1902, of 10,000 pounds of hops of the character and quality specified, and the price agreed to be paid therefor; but, as this sum had not been liquidated, the debt which was the consideration for this part of the security could not be ascertained, except by some judicial proceeding instituted for that purpose. It is true that plaintiff, in any event, was entitled to nominal damages; but this term is so indefinite, and the measure of this kind of damages depends upon so many elements, that it would be improper to permit him to be the judge of the sum to which he was entitled as such, or to take possession of the property to satisfy the same. Contracts of the character under consideration ought to be enforced, if possible; but as plaintiff had not reduced his damages to a matter of money value, so as to form a debt as a consideration for the security, he was not entitled to the possession of the property, for he could only take it for the purpose of selling it in the manner prescribed by law to satisfy his demand: B. & C. Comp. § 5637.

The execution of a chattel mortgage, though in the nature of a sale upon condition, creates a mere lien upon the property hypothecated to secure the payment of a debt or the performance of some duty: *Chapman v. State*, 5 Or. 432; *Knowles v. Herbert*, 11 Or. 54, 240 (4 Pac. 126); *Keel v. Levy*, 19 Or. 450 (24 Pac. 253). As a corollary from the legal principle thus announced, it follows that the mortgagor

retains such a title to the property mortgaged that he may sell or further incumber it: *Jacobs v. McCalley*, 8 Or. 124; *Commercial Nat. Bank v. Davidson*, 18 Or. 57 (22 Pac. 517); *Sommer v. Island Merc. Co.* 24 Or. 214 (33 Pac. 559). After condition broken, however, the lien of the mortgagee of chattels is converted into a qualified ownership of the mortgaged property, which entitles him to the possession thereof, and enables him, in case his right thereto is denied, to maintain an action therefor: B. & C. Comp. § 5636; *Case Threshing Mach. Co. v. Campbell*, 14 Or. 460 (13 Pac. 324); *Marquam v. Sengfelder*, 24 Or. 2 (32 Pac. 676); *Reinstein v. Roberts*, 34 Or. 87 (55 Pac. 90, 75 Am. St. Rep. 564); *Mayes v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319). When the mortgagee of chattels, after condition broken, secures possession of the mortgaged property by legal process, the mortgagor's title thereto is not extinguished, but continues until the lien is foreclosed and he is divested of such title in the manner prescribed by law. We think the rule deducible from a construction of our statute in the light of the decisions of this court upon the subject may be fairly stated as follows: The right given to a mortgagee of chattels, under Section 5636, B. & C. Comp., to recover the possession of the mortgaged property after condition broken, is intended to enable him to secure such possession for the purpose of foreclosure only; and unless there is some debt, ascertained or declared, so that the foreclosure can be had, the remedy cannot be invoked. If the obligation is unliquidated, the mortgagee must resort to some appropriate judicial proceeding to enforce his lien, in which the amount of his debt can be ascertained, and the rights of the parties declared and enforced.

5. In *Case Threshing Mach. Co. v. Campbell*, 14 Or. 460 (13 Pac. 324), it is intimated that the mortgagee of chattels, having secured their possession, might hold them until

the mortgagor redeems or in some other manner discharges his obligation, for Mr. Justice THAYER, in speaking of the mortgagee and of his right to the mortgaged property, says: "He may obtain control over it as a matter of right, and hold it as against every one until the mortgagor performs the conditions of the mortgage." If the language quoted was intended to mean that a mortgagee of chattels is under no legal obligation to foreclose his mortgage, and that the mortgagor, to free his property from the lien thereof, must take the initiative, we cannot yield our consent thereto, for the question was not involved in that case; and, though the excerpt is a fair statement of the rule that prevails in most of the other states, it is not, in our opinion, warranted by our statute, or borne out by the decisions of this court. Whatever the rule may be in other states of the Union, it is settled in this state that, if the mortgagee of chattels takes possession of the mortgaged property after condition broken, he cannot be permitted to keep, treat, or dispose of it as his own. The mortgage at its inception creates only a lien upon the property affected thereby, and the contract is not, in the strict sense of the term, a sale upon condition: *Woodside v. Adams*, 40 N. J. Law, 417. The legal claim which he asserts upon the mortgagor's default is the lien, coupled with the right to the immediate possession of the property; but, the mortgagee being a trustee of the mortgagor, the union of such lien and right can never ripen into a title until the lien has been foreclosed in the manner prescribed by law. If the mortgagor, with the consent of the mortgagee, retains possession of the chattels mortgaged after condition broken, he can recover their full value against an officer seizing them as the property of a third person: *Luse v. Jones*, 39 N. J. Law, 707. When the mortgagee secures possession of mortgaged chattels, it is for the purpose of satisfying his debt, upon the discharge of which his right to the property ceases: *Freeman v. Free-*

man, 17 N. J. Eq. 44. If, after taking possession of mortgaged chattels, he sells a part of them for a sufficient sum to pay his debt and expenses, his claim to the remainder of the property is extinguished; and, if he afterwards makes a further sale thereof, he will be liable to the mortgagor therefor: *Charter v. Stevens*, 3 Denio, 33 (45 Am. Dec. 444). The plaintiff's mortgage never having been foreclosed, he had no adequate title to the hops subject to his lien, and hence no error was committed in directing the jury to return a verdict for Buells.

6. It is also insisted that the court erred in refusing to permit the plaintiff to introduce testimony to prove that within the time prescribed he tendered to Buells the sum of \$500, under the terms of the contract, for the purpose of harvesting his hops. The testimony sought to be introduced was directed to an issue not involved, and hence the testimony was immaterial, for, if plaintiff was entitled to recover the possession of the hops, it was upon the theory that the security, which is in the nature of a chattel mortgage, conferred such right upon a breach of the conditions thereof; but he could not, in any view of the case, secure such possession under an executory agreement.

Other errors are assigned, but, deeming them unimportant, the judgment is affirmed. AFFIRMED.

Decided 26 October, 1903.

HEINEY v. HEINEY.

[78 Pac. 1038.]

43	577
47	160

NEED OF ALLEGING OWNERSHIP IN FORCIBLE DETAINER CASES.

1. In view of the provisions of Section 5747 of B. & C. Comp., that it will be sufficient, in actions for forcible entry and detainer, to describe with convenient certainty the property involved, to state that the defendant is in possession and unlawfully holds the same with force, and that plaintiff is entitled to the possession, it is unnecessary to allege the ownership.

JURISDICTION OF JUSTICE'S COURTS—TITLE TO REAL PROPERTY.

2. A justice's court is not ousted of jurisdiction in an action of forcible detainer because the complaint alleges and the answer admits the ownership of the land, as the title is not in any way thereby disputed.

45 Or.—57

FORCIBLE DETAINER—RIGHT TO AMEND APPEAL BOND—

3. Where there is a right of appeal from a judgment of a justice's court in an action for the restitution of real property, the appeal is not perfected until the special undertaking for twice the rental value of the property has been given, as provided by Section 5754, B. & C. Comp., and if such an undertaking is not given within the time limited, the appeal must be dismissed. In such cases the privilege of amendment conferred by Section 2249 is not available, because such privilege applies only to defective undertakings, and in the absence of any undertaking of the kind required there is nothing to amend by.

DISMISSING APPEAL—SPECIFICATION OF REASONS IN MOTION.

4. Where it is the duty of a court to dismiss an appeal *sua sponte* an indefinite motion to dismiss will be considered sufficient to require for action.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This is an action of forcible detainer of a tract of land known as the "Joseph Heiney Farm," commenced by Joseph Heiney against his sons, Arthur and Albert Heiney, in a justice's court of Multnomah County, where the cause was tried, and plaintiff obtained a judgment of restitution of the demised premises. From this judgment the defendants attempted to appeal by giving in open court, at the time it was rendered, an oral notice thereof, and thereafter filing an undertaking therefor, but failing to stipulate therein for the payment to the plaintiff of twice the rental value of the real property of which restitution was adjudged, from the rendition of such judgment until final judgment in said action, if such judgment should be affirmed on appeal. The transcript having been filed in the office of the clerk of the circuit court for said county, plaintiff's counsel moved said court to dismiss the appeal, assigning the following reasons therefor: "(1) That the court hath not jurisdiction to try said cause; (2) that no proper bond or undertaking upon appeal has been filed in this cause by appellants; (3) that no appeal has been taken in the manner provided by law." Before the determination of this motion, but thirty-six days after the notice of appeal was so given, the defendants' counsel moved said court for leave to amend the transcript, and also executed and filed a sufficient undertaking, but, their motion having been overruled,

the appeal was dismissed, and from the latter judgment they appeal to this court.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Edward T. Taggart*.

For respondent there was a brief and an oral argument by *Mr. John H. Hall*.

MR. CHIEF JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion.

1. It is contended by defendants' counsel that, the complaint having alleged "that plaintiff is the owner and entitled to the immediate possession" of the demanded premises, the action is in ejectment, and not forcible detainer, and, this being so, the justice's court had no jurisdiction of the subject-matter, and its judgment is void, and hence the undertaking originally given was sufficient, and the circuit court erred in dismissing the appeal and in not dismissing the action. In an action to recover the possession of real property held by force, the person entitled to the premises is required to give in the complaint a description thereof with convenient certainty, and to aver that the defendant is in possession thereof, and that he unlawfully holds the same by force, and that plaintiff is entitled to the possession thereof: B. & C. Comp. § 5747. It will thus be seen that in an action of this character an averment of ownership is unnecessary.

2. The allegation of ownership in the complaint is not, however, denied in the answer, and, this being so, the justice's court was not ousted of jurisdiction, for it is only when the title to real property comes into question therein by defense or plea, and the evidence taken at the trial shows that such title is actually contested, that the case must be certified to the circuit court: *Sweek v. Galbreath*, 11 Or. 516 (6 Pac. 220); *Malarkey v. O'Leary*, 34 Or. 493 (56 Pac. 521). We think, therefore, that the averments of

the complaint are sufficient to confer upon the justice's court jurisdiction of the subject-matter of the action, and that such court was authorized to render a judgment therein.

3. It is further maintained by him that his clients having given an undertaking on appeal, and, on objection thereto, tendered a sufficient undertaking before the determination of the motion to dismiss the appeal, the court erred in rendering the judgment here complained of. It is contended by plaintiff's counsel, however, that the legislative assembly has not granted the right of appeal from judgments rendered in justices' courts for the restitution of real property, and, this being so, no error was committed in dismissing the defendants' appeal. The circuit court having based its decision upon the failure of the defendants to give the undertaking prescribed by law, we do not deem it necessary to consider whether or not the right of appeal has been granted from judgments in cases of forcible entry and detainer, and shall assume, without deciding, that such right has been conferred, and that the mode of proceeding thereunder is regulated by the general statute on appeals from judgments rendered by justices' courts, modified, however, by the statute regulating the practice in cases of trials of actions for the restitution of real property. A judgment given in a justice's court in a civil action may be appealed from to the circuit court for the county by giving oral notice thereof in open court on the rendition of the judgment appealed from, or at any time within thirty days thereafter by serving a written notice thereof on the adverse party, or his attorney, and by filing the original, with proof of service indorsed thereon, with the justice, and by giving the undertaking for the costs and disbursements on the appeal: B. & C. Comp. § 2240. The undertaking of the appellant must be given with one or more sureties, to the effect that he will pay all costs and disburse-

ments that may be awarded against him on the appeal; but such undertaking does not stay the proceedings unless it further provide that the appellant will satisfy any judgment that may be given against him in the appellate court on appeal. The undertaking must be filed with the justice within five days after the notice of appeal is given or filed: B. & C. Comp. § 2241. An appeal cannot be dismissed on the motion of the respondent on account of the undertaking therefor being defective, if the appellant, before the determination of the motion to dismiss, will execute a sufficient undertaking, and file the same in the appellate court, upon such terms as may be deemed just: B. & C. Comp. § 2249. The foregoing excerpts and quotations from the statute prescribe the general mode of taking an appeal from a judgment rendered in a justice's court. The statute regulating the practice in such courts in actions for the recovery of the possession of real property contains the following provision: "If judgment be rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from such judgment until he shall, in addition to the undertaking now required by law upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged from the rendition of such judgment until final judgment in said action, if such judgment shall be affirmed upon appeal": B. & C. Comp. § 5754.

It will be remembered that the defendants did not give the undertaking prescribed by the section last quoted until after plaintiff moved to dismiss the appeal in consequence of their failure in this respect. The defendants having filed a sufficient undertaking before the determination of the motion to dismiss the appeal, the question to be determined

is whether section 2249 of the statute, hereinbefore quoted, when construed in connection with section 5754, is sufficient to confer jurisdiction of the appeal upon the circuit court. In *Danvers v. Durkin*, 14 Or. 37 (12 Pac. 60), it was held that, on appeal by a defendant from a judgment against him in an action of forcible entry and detainer, the giving of the undertaking for payment to the plaintiff of twice the rental value of the property of which restitution was adjudged, was a prerequisite to the right of appeal. In deciding the case, Mr. Chief Justice LORR, speaking for the court, says: "This undertaking is a special one for rent, and must be given in addition to the undertaking now required by law upon appeal in ordinary cases. The language of the statute is in denial of the right of appeal unless this undertaking is given. 'No appeal shall be taken,' it declares, 'until the defendant shall, in addition,' etc., 'give this undertaking,' or, in a word, perform the conditions of the statute. To make this provision efficacious, and fulfill the requirements of the law, it must be enforced in cases of actions of this kind." We think the decision in that case controlling in this, notwithstanding Section 2249, B. & C. Comp., authorizes a new undertaking to be filed when the one given on appeal is defective. In the case at bar the defendant, did not give even a defective undertaking of the kind prescribed, and, this being so, there was nothing to amend by, and hence no error was committed in refusing to consider the undertaking as a part of the transcript.

4. It is insisted by defendant's counsel that the motion to dismiss the appeal was too indefinite in its assignments to point out the particular defect relied upon to secure such dismissal. The undertaking given in the first instance failed to confer upon the circuit court jurisdiction of the appeal, and the court, upon its own motion, should have dismissed the appeal when its attention was called to the

defect, and we think the motion was sufficient for that purpose.

Other errors are assigned, but, deeming them immaterial, the judgment is affirmed. **AFFIRMED.**

Decided 31 October, 1903.

FLANDERS v. MULTNOMAH COUNTY.

[78 Pac. 1042.]

AMENDMENT OF STATUTES — IMPLIED REPEAL.

An amendment of a law under a constitutional provision requiring the statute to be set out in full as amended operates as an entire obliteration of the former statute from the time the new law goes into effect, and nothing can thereafter be done under its authority: *Smith v. Kelly*, 21 Or. 464, distinguished.

B. & C. Comp. §§ 3057, 3120, providing that the assessment for taxes shall begin on the first Monday in March, and setting forth the dates for all acts in reference thereto, are amended by Laws 1903, p. 295, setting them out in full as amended, and substituting an entire change of dates, making the assessment begin on the first Monday in January, etc., and providing that the new law shall go into force January 1, 1904. *Held*, that such amendment operated as an entire repeal of the former statutes, and, on the taking effect of the new law, no further proceedings could be had under the old, though the effect was to leave officials without authority to estimate and apportion the necessary tax for that year.

From Multnomah: **JOHN B. CLELAND**, Judge.

Suit by Maria L. Flanders against Multnomah County and its officers, wherein there was a decree as prayed, and defendants appeal. Submitted on briefs under Rule 16.

AFFIRMED.

For appellants there was a brief over the names of *John Manning*, District Attorney, and *Carey & Mays*, with an oral argument by *Mr. Chas. H. Carey*.

For respondent there was a brief over the names of *Chas. E. S. Wood*, *Stewart B. Linthicum*, and *J. Couch Flanders*, with an oral argument by *Mr. Linthicum*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to determine, by way of injunction, the effect of certain changes contemplated by the legislature in the law relative to assessment and taxation (Laws 1903, p. 295). By express provision, the new law is to go into

effect and be in force from and after the 1st day of January, 1904. Section 3057, B. & C. Comp., provides that the assessor shall on the first Monday in March procure a blank assessment roll, and forthwith proceed to assess all taxable property within his county, and return such roll to the county clerk on or before the first Monday in September, with a full and complete assessment of such taxable property entered thereon; that the county court may, if necessary, extend the time for returning such roll until the first Monday in October; and that every person shall be assessed in the county where he resides on the 1st day of March of the year when the assessment shall be made. By the amendment thereto, the assessor will be required on the first Monday of January, 1904, and on the first Monday in January of each year thereafter, to procure a blank assessment roll, proceed with the assessment of the taxable property owned by each person on January 1st of each year, and return the same on or before the first Monday in July. Section 3060 of the compilation provides that the assessor shall give three weeks' public notice that on the last Monday in August the board of equalization will attend at the county clerk's office, publicly to examine the roll, make corrections, etc. The amendment provides for the meeting of such board on the first Monday in July. Section 3084 provides that the county court or the board of county commissioners shall, at its term in January of each year, estimate the amount of money to be raised in each county for county purposes, and apportion such amount, together with the amount of state and school taxes required by law to be raised in the county, according to the valuation of the taxable property in the county for the year. The amendment fixes the time for making the estimate and apportionment at the September term of each year. Section 3085 provides that, for the purpose of raising revenue for county purposes, the

county court or board of commissioners for each county shall, at its January term in each year, levy a tax upon all taxable property in its county, sufficient in amount to defray the expenses thereof. The amendment requires the levy to be made at the September term in each year. Section 3090 relates to the apportionment of revenues among the counties by the Governor, Secretary of State, and State Treasurer in January. The amendment requires it to be made in July of each year. Section 3106 provides for the payment of taxes on the first Monday in April and October of each year; the amendment, for the payment on or before the 31st day of December of the same year and the first Monday in the April following; section 3107, that the sheriff shall proceed to collect immediately after the first Monday in May; section 3112, that he shall extend the delinquent list on the roll after the first Monday of October; and section 3120, that upon the return of the roll to him he shall give notice of the sale of real property for delinquent taxes, to be made not later than March 1st of each year. The amendments of these sections require the sheriff to proceed to collect immediately after the first Monday in February, to extend the delinquent list after the first Monday in April, and to give notice of sale for delinquent taxes to be held not later than October 1st of each year. These sections are all amended in the usual manner, and as contemplated by the Constitution (Const. Or. Art. IV, § 22), by setting them out in full in the amendatory act as amended.

It will readily be observed that the purpose of the amendatory act is to change the dates upon which the several official acts designated shall be performed, the mode of assessment and levy and the manner of collection remaining the same. All the dates in the process are completely shifted; that is to say, instead of beginning the assessment on the first Monday in March, and making

it as of that date, returning the roll on or before the first Monday in September, giving notice of the meeting of the board of equalization on the last Monday in August to examine and correct the roll, making the estimate and levying the tax at the January term of the county court, and apportioning the revenues by the state board to the several counties in January, the amendments contemplate that the assessment shall begin on the first Monday in January, and be made as of that date; that the return shall be made on or before the first Monday in July, notice given of the meeting of the board of equalization to be held on that day; that the estimate be made and tax levied at the September term of the county court, and that the apportionment of revenues to the several counties shall be made in July, and instead of the taxes becoming payable on the first Monday in April and October, and requiring the sheriff to proceed to collect after the first Monday in May, to extend the delinquent list on the roll after the first Monday in October, and give notice of the sale of real property for delinquent taxes to be made not later than March 1st, the amendments contemplate that the taxes shall become payable on or before December 31st and the first Monday in April following; that the sheriff shall proceed with collections after the first Monday in February, extend the delinquent list after the first Monday in April, and give notice for the delinquent sale, to be held not later than October 1st. The true situation is perfectly manifest. The old statute relative to the matters alluded to is to be replaced by the amendments, thus abrogating completely the law as it now stands. It is not the case of a repeal, either directly or by implication, except as the amendments supersede and displace the old statute. The new is substituted for the old, leaving no vestige of the old for operation.

Such is the holding of the Supreme Court of Indiana,

under a constitutional clause providing the mode for revision and amendment precisely as ours, and from which ours was probably adopted, in *Blakemore v. Dolan*, 50 Ind. 194, 204, where the court say "that, when a section in an existing law is amended in the mode prescribed by the Constitution, it ceases to exist, and the section as amended supersedes such original section, * * and becomes incorporated in, and constitutes a part of, the original act; and the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words." So it was held in *State v. Ingersoll*, 17 Wis. 651, where the court was considering the effect of a statute which provided that a certain section of a former statute should be "amended so as to read as follows," that the conclusion was irresistible that any provision of the section not found in the new act was repealed, saying: "This must be so, since the legislature says expressly that that section shall thereafter read and be to the effect following; then going on to enact a complete substitute for the former provision. In what clearer manner could the legislature indicate its intention to supersede, change, and repeal section 5 [Rev. Stat. 1858, c. 35], than by the one adopted? It is amended so as to read and be to the effect therein prescribed, and quite different from what it was as it formerly existed. * * The legislature in effect says that such provision of law shall be read and construed to be as therein declared, and shall have no other meaning or effect given to it." The same court, in *Goodno v. City of Oskosh*, 31 Wis. 127, 129, in further exposition of the rule as laid down in *State v. Ingersoll*, and applying it to the case in hand, say: "This court decided that where a statute provides that a certain section of a former statute shall be 'amended so as to read as follows,' etc., any provision of such section not found in the new statute is repealed. It follows very clearly from that decision that, whatever pro-

vision of the former statute was in force after the amendment of 1868, it was so in force because of being found in the amended act, and that, if all or substantially all of the former section continued to be the law, it was merely by reason of its having been copied into and reenacted with the amendment. The original section, as an independent and distinct statutory enactment, ceased to have any existence the very moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The original section, as a separate statute, was as effectually repealed and obliterated from the statute book as if the repeal had been by direct and express words, and none of its provisions had been reenacted." This statement of the law is well substantiated and is unquestionably sound. See, further, *Denver & R. G. Ry. Co. v. Crawford*, 11 Colo. 598 (19 Pac. 673); *People v. McNulty*, 93 Cal. 427 (29 Pac. 61); *State v. Andrews*, 20 Tex. 230.

Applying the rule to the present exigency, all the sections of the old law relative to the assessment and collection of taxes set out in the amendatory act, as amended to be in force and effect from and after January 1, 1904, will be wholly obliterated and superseded by the new sections as contained in the amendatory act, which latter will become solely operative and effective from and after that date. The logical consequence is that the county court or the board of county commissioners will be left without power or authority to estimate the amount of money to be raised for county purposes, or to apportion the same with the state and school taxes according to the valuation of the taxable property in the county, or to levy a tax thereon for the purpose of raising revenue at its term in January. So with the Governor, Secretary of State, and State Treasurer. They cannot act in apportioning the revenues for

the state among the counties until July. Whatever act shall be or shall have been regularly done under the old law up to the time of the taking effect of the amendatory act must stand as perfectly valid and effectual; but no act can be performed thereafter under the sections of the old law falling within the purview of the amendments, simply because it will not then exist or be at all operative, having been wholly obliterated and displaced by such amendments. Such is the necessary and inevitable effect of the legislation, adopted, no doubt, in its present form, through casual oversight; and although it may operate unfortunately, in leaving the state and its subordinate political subdivisions without adequate revenues for the current year, the courts are powerless to remedy the evil. They cannot legislate, but must construe the law and determine its effect as they find it, and beyond that they cannot assume to act. This is decisive of the controversy.

It has been suggested, however, that the case of *Smith v. Kelly*, 24 Or. 464 (33 Pac. 642), and other authorities announcing a like principle, might afford a solution of the problem favorable to the appellants. But it is not to the purpose. In that case there was a repeal of the mortgage tax law, together with the remedy especially provided for the collection of taxes levied on mortgages; and it was held that the repeal, not being of a special tax law, but in the nature of a revision of the general taxing system, did not affect taxes theretofore levied against property of that species, and that, a remedy still remaining under the general provisions for the collection of revenue, the payment of taxes so levied was susceptible of enforcement thereby; therefore that the taxes assessed and levied against mortgages did not fail because of the want of a remedy to enforce their collection. The case at bar is not of that character. Here there will be a valid assessment of property prior to the taking effect of the amendments, but no levy

of any tax thereon, and there will exist no power or authority, under the new law or elsewhere, to make any levy prior to the September term of the county court or board of commissioners, nor will any tax become due or payable until later, and no remedy will remain or exist to be applied for its collection until after that; and there is absolutely no room for an interpretation giving the amendments prospective application and force as to assessments already completed by the assessors. The tax system is revised, it is true, but the power of levying the tax at the time appointed under the old law, together with the remedy, is entirely swept away, so that we must look to the amendments for whatever of vitality there may be in the law. It follows from these conclusions that Multnomah county and its officers must be enjoined from proceeding under the provisions of the old law as comprehended by the amended sections from and after January 1, 1904, and a decree will be here entered accordingly.

AFFIRMED.

Argued 21 October, decided 16 November, 1903.

LA VIE v. TOOZE.

[74 Pac. 210.]

CONSTRUCTION OF EXECUTORY CONTRACT OF SALE—PASSING TITLE.

1. Title does not pass to an unsegregated number or quantity of chattels, as, a stated number of pounds of hops out of a certain crop, by a contract for their sale *in futuro*, in the absence of a special provision to that effect.

COMPETENCY OF EVIDENCE OF DELIVERY UNDER EXECUTORY CONTRACT.

2. Where replevin is brought for property contracted for delivery when it shall come into existence, it may be shown that the property was actually delivered in pursuance of the contract, as thereby the buyer perfected his title.

PAROL EVIDENCE TO IDENTIFY PERSON MEANT BY WRITING.

3. Where a power of attorney appoints C. K. and — K., said C. K. and — K., composing the firm of K. Bros., and doing business in the name of K. Bros., as the grantor's lawful attorneys, etc., parol evidence is admissible to supply the Christian name of the person whose Christian name was left blank, it not tending to enlarge or alter the writing, but rather to identify a person referred to therein.

From Marion: GEORGE H. BURNETT, Judge.

This is an action by Geo. La Vie against Walter L. Tooze

to recover the possession of 40 bales of hops, or \$1,662.12, the value thereof, in case delivery could not be had, and \$300 for the alleged wrongful detention thereof. The answer denies the material allegations of the complaint, and avers that the hops are of the value of \$2,000, and, for a further defense, alleges, in substance, that at all the times mentioned in the complaint the defendant was the owner of the hops, and in the rightful possession thereof until November 3, 1902, when they were wrongfully taken from him by the plaintiff, to his damage in the sum of \$100. For a second defense it is stated, in substance: That on January 16, 1902, plaintiff and one J. R. Kaser entered into an executory contract for the sale of 8,000 pounds of hops to be grown by the latter in Marion County during that year; a copy of the agreement being attached to, and made a part of, the answer; that in pursuance of such contract, plaintiff, at the time it was entered into, advanced to Kaser \$1.00, and thereafter various other sums, amounting, with interest, on October 31, 1902, to \$490.50, which sum on that date Kaser tendered to plaintiff, who refused to accept the same, or any part thereof, and was thereafter deposited in court for him with the answer; that the hops mentioned in the complaint are the identical hops specified in the contract, and plaintiff's only claim or title thereto is by virtue of the executory agreement; that, after the execution of the contract, Kaser cultivated, harvested, baled, and retained the hops in his possession until about November 1, 1902, when he sold and transferred them to the defendant; that Kaser performed all the terms of the agreement upon his part, but plaintiff refused to comply with the stipulations thereof assumed by him. A supplemental answer was filed, alleging that, since the filing of his answer, plaintiff wrongfully secured the possession of and unlawfully removed the hops from the state, and converted them to his own use, to the defendant's damage in the sum of \$2,000. Re-

plies having put in issue the allegations of new matter in the original and supplemental answers, a trial was had, resulting in a judgment that defendant was the owner and entitled to the immediate return and possession of the hops, or to recover \$1,800, the value thereof, and the sum of \$32.60 as damages, from which judgment plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Carson & Adams*, *Peter H. D'Arcy*, and *John M. Gearin*, with an oral argument by *Mr. D'Arcy* and *Mr. Loring K. Adams*.

For respondent there was a brief over the names of *Hiram Overton*, *L. J. Adams*, and *Geo. G. Bingham*, with an oral argument by *Mr. Overton* and *Mr. Bingham*.

MR. CHIEF JUSTICE MOORE, after stating the facts as above, delivered the opinion of the court.

Counsel for plaintiff offered in evidence a power of attorney executed by him August 13, 1902, the material part of which is as follows :

"Know all men by these presents that I, George A. La Vie, of the State, County and City of New York, have made, constituted and appointed, and by these presents do make, constitute and appoint, Conrad Krebs and — Krebs, of the City of Salem, in the State of Oregon, said Conrad Krebs and — Krebs composing the firm of Krebs Brothers, and doing business under the name of Krebs Brothers, my due and lawful attorneys for me and in my name, place and stead, to institute and carry on all legal proceedings necessary to compel the performance of the written contracts entered into by the said George A. La Vie in the State of Oregon for the purchase or consignment of hops, * * to receive any and all of the said hops when delivered."

An objection to this instrument on the ground that it was immaterial and irrelevant, and that it therefrom appeared that Conrad Krebs only was appointed agent, having been sustained, an exception was saved. M. W. Krebs appearing as plaintiff's witness, the following questions

were propounded to him: "Are you a member of the partnership of Krebs Bros.?" "I will ask you, Mr. Krebs, who, on the 16th day of January, 1902, in this county, constituted the firm of Krebs Bros.?" "I will ask you, Mr. Krebs, what you did with Mr. Kaser, on the 25th day of October, 1902, with respect to the delivery of the hops mentioned in the pleadings in this case to La Vie by you, as La Vie's agent?" Plaintiff's counsel here said to the court: "We want to show an actual delivery of the hops." "I will ask you, Mr. Krebs, if you know who was the agent of La Vie in Marion County at that time—on October 25, 1902." Objections to these questions on the ground that they were immaterial and incompetent having been sustained, plaintiff's counsel stated to the court: "One thing I overlooked, and that is, I want to prove by this witness that he was a member of the firm of Krebs Bros., and that the firm was constituted of Conrad Krebs, Leonard Krebs, and M. W. Krebs." It is contended by plaintiff's counsel that the court erred in excluding the power of attorney and in not permitting the witness to answer the questions above quoted.

1. The contract entered into for the sale of the hops was executory, requiring Kaser to care for, cultivate, and harvest the crop; thus showing that no title or right of possession passed by the instrument, and thereby precluding the maintenance of an action to recover possession of the property: *Backhaus v. Buells*, 43 Or. 558 (73 Pac. 342).

2. In this state of the case, the power of attorney was immaterial, unless there was a voluntary delivery of the hops to plaintiff's duly constituted agent. It will be remembered that the witness was asked what he, as plaintiff's agent, did October 25, 1902, with reference to the delivery of the hops; and, an objection to the question having been sustained, plaintiff's counsel stated to the

court: "We want to show an actual delivery of the hops." It is fairly inferable from the question and the statement quoted that Kaser delivered the hops to the witness, and, if the latter was plaintiff's agent, the executory contract became executed, and the right of possession of the property passed by such act; and, if it was thereafter taken by any person from the plaintiff without his consent, this action could be maintained to recover its possession.

3. It will also be remembered that plaintiff's counsel stated that he wanted to prove by the witness that he was a member of the firm of Krebs Bros., which consisted of Conrad Krebs, Leonard Krebs, and M. W. Krebs; and this presents the question whether or not oral testimony was admissible to show that any other than Conrad Krebs, who is named in the power of attorney, was by that instrument appointed plaintiff's agent. In *Price v. Page*, 4 Ves. Jr. 679, a legacy having been bequeathed to — Price, the son of — Price, it was held that testimony was admissible to show the Christian name of, and to prove the identity of, the legatee. In *Herring v. Boston Iron Co.* 1 Gray, 134, a written agreement having been entered into whereby the plaintiff agreed to slate a building to be erected in South Boston "by Horace Gray, Esq., and others," it was held that extrinsic evidence was admissible to show who were designated by the words "and others" in the written agreement, Mr. Justice THOMAS saying: "To ascertain who are the parties, resort must be had, in the first instance, to the written instrument. If this fail to designate them, or either of them, resort must be had to extrinsic evidence to supply the want." In *Wadsworth v. Allen*, 8 Grat. 174 (56 Am. Dec. 137), in an action on a letter of credit addressed to Wadsworth and Williams, it was held that testimony was admissible to prove that the letter was intended for Wadsworth, Williams & Co., so as to hold the writer bound to the latter thereon. In *Leach*

v. *Dodson*, 64 Tex. 185, a grant of real property having been made to — Hale, it was held that testimony was admissible to prove the Christian name. In *Holmes v. Moon*, 7 Heisk. 506, a deed having been executed to Jarrett Moon & Co., it not appearing whether the firm was composed of Jarrett and Moon and others, or Jarrett Moon (one person) and others, it was held that the uncertainty arising from the omission of the Christian names of the grantors might be removed by parol proof. The rule is well settled in this state that parol evidence is admissible to explain an ambiguity, to identify property, and to apply an instrument to the subject-matter to which it relates: B. & C. Comp. § 704; *Jones v. Dove*, 6 Or. 188; *Boehreinger v. Creighton*, 10 Or. 42; *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *Sommer v. Island Merc. Co.* 24 Or. 214 (33 Pac. 559); *Reinstein v. Roberts*, 34 Or. 87 (55 Pac. 90, 75 Am. St. Rep. 564). The testimony rejected by the court did not, in our opinion, tend to enlarge the power of attorney, but was calculated to show who were intended by the designation "Krebs Brothers," and for that purpose was admissible, as was also the testimony which might have disclosed that the hops had been voluntarily delivered by Kaser to plaintiff's agent. For the error committed in excluding such testimony, the judgment is reversed, and a new trial ordered.

REVERSED.

Decided 1 February, rehearing denied 2 March, 1904.

SMITH'S ESTATE.

ARNOLD v. SMITH.

[78 Pac. 388, 75 Pac. 138.]

43	595
148	292
48	378

APPEAL — ORDER TO SELL REALTY — WIDOW AS ADVERSE PARTY.

1. The widow is not a necessary or even a proper party to a proceeding to procure the sale of the realty of a decedent to pay debts, and her position is not affected by her being a joint maker with her deceased husband of the obligations to be paid. Not being properly in the litigation, she is in no sense an adverse party to any appeal, under Section 549, subd. 1 of B. & C. Comp.

EFFECT OF ADMINISTRATOR'S SALE ON DOWER.

2. A widow's right of dower is not affected by a sale of realty to pay debts of her deceased husband.

ORDER TO SELL REALTY—APPEALABLE INTEREST OF ADMINISTRATOR.

3. An administrator has an appealable interest in an order of a county court dismissing his petition for a license to sell property of the estate to pay a claim which has been allowed.

EVIDENCE OF RESIDENCE OF CREDITOR.

4. The evidence is satisfactory that the creditor whose claim was allowed in this case was a resident of this state when the claim became due.

BURDEN OF PROOF ON THE ENTIRE CASE.

5. Under the general rule that the party making an allegation has the burden of proof in reference to it, the objectors to an order for the sale of a decedent's realty, on the ground that the claimant was not a resident of this state when his claim matured, must prove their case, taking into account all admissions and all presumptions from conceded or established facts.

EXTENDING LIMITATIONS THROUGH PAYMENT BY JOINT MAKER.

6. Under B. & C. Comp. § 25, providing that if any payment shall be made on a contract after it has become due, the limitation shall commence from such payment, a payment by one joint maker of a note before limitation has expired will continue the liability as to all.

STATUTES OF WASHINGTON—CLAIMS—NONINTERVENTION WILL.

7. Section 6228 of Ballinger's Ann. Codes & Stat. Wash., providing that claims not presented against an estate within one year after the first publication of the notice to creditors shall be barred, does not apply to claims against an estate settled under what is known in that state as a nonintervention will.

LACHES IN ASKING FOR SALE OF DECEDENT'S REALTY.

8. A delay of nearly ten years in procuring letters of administration and filing a petition for license to sell real estate to pay a claim against a testator's estate, the ownership or condition of the realty not having changed, and the time for the running of the statute as to realty not having elapsed, is not such laches as to bar the right to make the sale.

ESTOPPEL—ADMISSIONS IN PLEADINGS BY GUARDIANS AD LITEM.

9. An admission in a pleading must be taken as true not only on the trial of the cause in which such admission is made, but on appeal as well, whether the admission be made by a competent person or by an infant through a guardian *ad litem*. For instance: it being admitted in objecting to an administrator's petition for leave to sell the real property to pay claims against decedent that the only property belonging to the estate is such realty, the objectors, whether adults, or minors acting through a guardian, will not be permitted to urge on appeal an absence of proof that the personality had been exhausted.

From Multnomah: JOHN B. CLELAND, Judge.

Proceedings for the sale of real estate of a decedent for the purpose of paying claims against the estate. From a decree of the circuit court reversing an order of the county court and directing a sale the property, the objectors appeal. A motion to dismiss the appeal was overruled, and the decree afterward affirmed, both opinions being written by Mr. Justice WOLVERTON.

MOTION OVERRULED: AFFIRMED.

ON MOTION TO DISMISS THE APPEAL.

Mr. S. B. Huston for the motion.

Mr. G. C. Moser, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a motion to dismiss the appeal from the decree of the circuit court reversing an order and decree of the county court of Multnomah County, and remanding the cause, with directions to grant an order of sale of the real property belonging to the estate of the deceased, for the purpose of paying a certain alleged claim against the estate and the expenses of administration. The deceased died testate in the State of Washington, leaving the following-named heirs: His widow, Annie J. Davis, *nee* Smith, and a son and daughter, named respectively, Albert U. and Ethel M. Smith, to the two latter of whom he devised the land which it is now sought to have sold by order of the probate court. The widow joined with the two children in their objections to the petition for the sale, and, being successful, the petitioner, F. K. Arnold, appealed to the circuit court, making all the objectors parties to the appeal, and succeeded in obtaining the decree from which this appeal is prosecuted. The objectors have all joined in the notice of appeal to this court, but the widow did not join in the undertaking, and the motion to dismiss is based upon the grounds (1) that there is no sufficient undertaking, and (2) that Annie J. Davis is an adverse party, but is not made a party to the appeal.

1. It is difficult to see how Mrs. Davis can be affected by a reversal of the decree appealed from, and, if she cannot, she is not an adverse party to the appeal. She is a joint maker, with the decedent, of the note, it is true; but the proceeding is not against her as such maker, but *in rem*, to subject the realty of the estate of the decedent to its pay-

ment, and no decree can be given against her in any event. It is said that, if the real estate is sold, and the proceeds applied to the payment of the demand, as required by the decree of the circuit court, it would lessen her liability, and that, therefore, a reversal will affect her adversely. Her purpose from the beginning was to defeat the sale, which is inconsistent with the idea that she would get hurt by a reversal; but, whatever part she has taken, the result of the proceedings can only affect her incidentally, and because she is a comaker of the note affords in itself no ground for making her a party to the proceedings in the first instance, and, not being a proper or necessary party thereto, she cannot be accounted an adverse party to any appeal that may be prosecuted.

2. It is further suggested that she has a dower estate in the realty sought to be sold, and for that reason she is an adverse party. That she has a dower may be assumed, unless cut off by the will or some other way; but, concede it, the order of the court cannot affect it: *Whiteaker v. Bell*, 25 Or. 490 (36 Pac. 534). If she is without dower, then she has no interest whatever to be affected; so that, in any event, she is neither a proper, necessary, or adverse party to the proceedings. This being so, the undertaking is regular, and the motion will be denied.

MOTION OVERRULED.

ON THE MERITS.

Charles O. Smith died in Lewis County, Washington, September 15, 1891, leaving a nonintervention will and property situated in that state and Oregon. The will was admitted to probate in Washington, November 13, 1891, and W. G. Gaunce and the widow, Annie J. Smith, since married to Davis, were appointed executors. No notice to the creditors was ever published, but, notwithstanding, an

order of the court was made in the year 1898 discharging them. On March 15, 1891, Charles O. and Annie J. Smith executed and delivered to George F. Gibson their note for \$2,500 for money loaned, payable three years after date. On March 12, 1896, Mrs. Davis, *nee* Smith, made a payment of \$456 on the note in the following manner: Gaunce, her coexecutor, being indebted to her in that sum, Gibson agreed with them to take his notes for the amount, and give credit therefor on the Smith note, which was accordingly done. On May 6, 1901, F. K. Arnold, the respondent herein, was appointed by the county court of Multnomah County administrator with the will annexed of the estate of Charles O. Smith in Oregon. The claim of Gibson arising upon the note in question was subsequently presented to Arnold as such administrator, and by him allowed, and on July 11th following he petitioned the court for a license to sell the real property situate in such county to pay said claim and the costs and expenses of administration. The petition sets forth the necessary jurisdictional facts showing the presentation and allowance of the claim against the estate, that no personal property has come into the hands of the administrator, and that the only property belonging to the estate in Oregon is the real property, a particular description of which is given. A citation being issued to the heirs and devisees, Albert U. and Ethel Smith, both minors, appeared by their guardian *ad litem*, G. C. Moser, and answered, denying that the estate was indebted to Gibson, and setting up the statute of limitations of Washington as a bar to the claim. The county court found in favor of the devisees, and from the decree dismissing the petition the administrator alone appealed to the circuit court. A motion was there interposed to dismiss the appeal, assigning, among other reasons, that the administrator has not an appealable interest in the proceeding. This was denied, and, the circuit court having rendered a decree

reversing the county court and allowing the petition granting a license to sell the real property, the devisees have appealed to this court.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Gustavus C. Moser* and *Mr. Miller Murdoch*.

For respondent there was a brief and an oral argument by *Mr. Samuel B. Huston*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

3. The first question presented upon the record is whether the administrator had a right of appeal from the order of the county court denying his petition for a license to sell real property for the payment of the claim in question and the costs and expenses of administration. It is insisted with much force that the administrator was not aggrieved by the order or decree, and therefore had not such an interest in the controversy as would authorize him to prosecute the appeal, and that, if any right of appeal existed, it was in favor of Gibson, the creditor, and not the administrator. We said in the case of *Hume v. Turner*, 42 Or. 202, 208 (70 Pac. 611, 614): "It is a statutory rule that a litigant can only appeal from an order affecting a substantial right (Hill's Ann. Laws 1892, § 535), which accords with the fundamental principle, everywhere recognized, that he has no appeal unless aggrieved by the judgment or decree of the trial court." We consider the rule to be well founded, and fully substantiated by the authorities there cited; so that we have here only to determine whether the administrator had such an interest in the order that some substantial right of his, either in his personal or representative capacity, was impaired thereby. It must be premised that Gibson's claim was duly presented to the administrator, and by him allowed as a just and legal demand against the estate. As there was no

personal property out of which to provide for its payment, the law made it his duty to sell the real property. In pursuance of that duty, he petitioned for a license authorizing him to sell. The devisees are contesting his right to such license, alleging as one of the grounds therefor that Gibson's claim is not a valid demand against the estate because the statute of limitations has run against it, which, being the case, it is argued the administrator is without foundation upon which to base his application for the license. It is then urged that this is the only question to be litigated, and, whether it is decided one way or the other, it could not affect the administrator injuriously; therefore that he has no appealable interest.

The argument overlooks the basic principle that, the claim having been allowed, it was at least *prima facie* valid, and thenceforth in all auxiliary proceedings to provide for its payment the administrator represents the creditor. The law casts upon him the burden of establishing every fact necessary to maintain his application to sell, and if he fails as to one in the court of original jurisdiction it is of no more consequence to limit his right to appeal than if he fails in another. His *prima facie* case is made, so far as it is necessary that the application be based upon valid claims against the estate, when he has produced the claims duly allowed. If it is attacked in the procedure, and adjudicated to be invalid, it can be no more effective to cut off his authority to proceed further with the matter than if any other controverted fact had been decided against him; as, for instance, the insufficiency of the personal property to pay the demand. The fact in dispute as to the validity of the claim, although jurisdictional, is incidental only to the application for a license to sell, and the interest of the administrator in his representative capacity cannot be precluded by the judgment of the court of original cognizance against him upon that issue. It is said by Mr. Chief Jus-

tice BRICKELL in *Spence v. Parker*, 57 Ala. 196, 197: "It is the right of the personal representative, essential to his protection, and a duty he owes to creditors, to apply for and obtain an order for the sale of lands for the payment of debts when the necessity exists. The denial of a proper application, supported by proper evidence, is the denial of a clear legal right, as much so as the rendition of judgment of dismissal in a court of law against a plaintiff having a just cause of action, properly presented and proved." For this reason a motion to dismiss an appeal presented by the personal representative was denied. The principle finds further support in *Jamison v. Adler-Goldman Com. Co.* 59 Ark. 548 (28 S. W. 35); *In re Welch's Estate*, 106 Cal. 427 (39 Pac. 805); *In the Matter of the Estate of McCune*, 76 Mo. 200. So we conclude that the administrator had an appealable interest in the order denying him license to sell the real property. The order was without question final as to the administrator, as it determined his right to subject the real property to the payment of the demand in question, and precluded him from proceeding further in the premises. It follows that the motion in the circuit court to dismiss the appeal from the county court was properly denied.

4. We come now to consider whether Gibson's claim was barred by the statute of limitations. This depends primarily upon whether Gibson was a resident of the State of Washington at the time the cause of action accrued upon the note in controversy, namely, March 15, 1894. This question is mainly one of fact, to be determined from the evidence adduced at the trial. By the statute of Washington an action upon a contract of the nature here involved can only be commenced within six years after the cause of action shall have accrued: Ballinger's Ann. Codes & Stat. §§ 4796 and 4798, subd. 2. Under our statute (B. & C. Comp. § 26), when a cause of action has arisen in an-

other state between nonresidents of this state, and by the laws of that state an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state. This statute has received construction at the hands of this court in the case of *Crawford v. Roberts*, 8 Or. 324, and its meaning is well understood. Did the cause of action accrue between nonresidents of this state? It is admitted that Gibson was residing at Centralia, Washington, at the time the note was executed, and beyond this the evidence consists of the testimony of four witnesses, namely, Mrs. Davis, Gibson, the claimant, and Andrew and George Lewis. The latter two are brothers of Mrs. Davis, and all are cousins of Gibson. Gibson testifies, in effect, that he was residing at Centralia, Washington, at the time he made the loan to the Smiths, but that he came to this state shortly afterward, and has since made his home with Daniel Lewis, his uncle, at Russellville, Multnomah County, the most of the time; was sometimes in Washington and a while in the East; that he was living here during the year after Smith died, September 15, 1891; that after her husband died (a year or more) he stayed awhile with Mrs. Davis in Washington, and fixed a fence for her—just long enough to get her yard fixed up; that he was living at her house at the time she was married to Davis, and that from the time Smith died he had been there once in a while; that after the marriage he did not stay long, but came over to Oregon; that he was at his aunt's, Mrs. Isham's, in Washington, off and on, but not very long at a time; that he never made his home there; that he worked for Isham's son through harvest one summer before the elder Isham died. When asked where he made his home in 1891, 1892, and 1893, he could not say, but guessed it was here in 1894 and 1895. Later he was interrogated and answered as follows: "Was it not less than a year ago when Mr. Lewis, the old gen-

tleman who is dead now, made a provision for you for a home out here at his place? A. He said I could stay at his place—make my home there. Q. You have been making your home there ever since? A. Yes, and before. Q. How long before? A. Most all of the time while I was over here. Q. How many years back of that? A. Ever since I sold my place in Washington I made my home mostly here. Q. You said a little while ago you did not know where you were in 1891. A. I said when I was over here.” He further testifies that he voted in Oregon seven or eight years ago; that it was at a state and county election, but did not know what one it was. On redirect he testifies that he sold his land in Washington just a while before he loaned the money; that he had been in Oregon before Smith died; that he went back and sold the place, and loaned the money to them, and came back over here, and that since that time he never called that his home over there; that he stopped with Mrs. Davis sometimes and Mrs. Isham sometimes.

George Lewis testifies that he was living with his father until 1895, since which time he has been living in the same yard; that Gibson began making his home with his father at Russellville before his brother-in-law, Smith, died in 1891, and that he has always made his home there since, except that he was away in Washington from time to time, and in later years has been in Illinois; that the witness was in Washington in 1892; that Gibson was there a little while in the summer of that year; that he stayed the rest of the year over there, first at one place and then at another, but did not stay very long at a time; that he stayed around with his aunt and uncle and his brother, visiting from place to place; that he has had his clothes at his father's ever since 1891; that he claims his father's place as his home, and has so claimed it ever since 1891; and that he never spent as much as a year in Washington at

any time after coming over here, but that he would stay over there two or three months, sometimes six, and then he would spend the rest of his time here, prior to the time he went to Illinois. Mrs. Davis testifies that in March, 1891, when the note was given, Gibson was living at her place in Centralia, Washington, just like one of her family; that he continued to reside there after that; that he was residing there in 1893 and 1894; that he came to Oregon in about 1896, and subsequently went to Illinois; that he is making his home now at her mother's place at Russellville, in this state; that before the death of her father, which occurred some time during the early summer of 1900, he told her mother to keep him there, to let him make his home there; that in 1890 he was making his home in Washington, and has continued to reside there ever since up until last year. She further testifies that Gibson spent the year after her husband's death at her house, and after he left there he made his home with his aunt on Porter Creek, in Chehalis County, Washington. On cross-examination she says that Gibson was at her house in 1891, 1892, 1893, and 1894, and came over here in 1896, and, in rebuttal, that he was there quite a long while, did a good deal of work for her; that she remarried December 14, 1892, and that he was still with her, and remained there awhile afterward; and that he went from there and made his home with her aunt, Mrs. Isham, staying there all winter, working for her.

Andrew Lewis, who lived about a quarter of a mile from his father's, testifies that he never knew of Gibson making his residence in Oregon during the years 1891, 1892, and 1893, and that it was a surprise to him when asked about the matter; that Gibson never made his home at his father's any more than going there and staying and working for him and for his brothers around there whenever he could get a job; that he never heard of his making his per-

manent home there; that he used to stop at his brother's some, and was going back and forth from Oregon to Washington, which he did a dozen times inside of the time; that he was in Russellville, Oregon, in 1893; that he went to Washington the latter part of 1893, and came back late in 1894, or early in 1895, stayed around awhile, and went back over there in 1896, and late in 1897 he went to Illinois, and stayed there until some time in May or June, 1900, when he came back here. When asked if Gibson had any permanent home in Oregon the early part of 1890 and until 1895, he answered not that he knew of; if he did, he never knew of it; that he was working for his brother in the nursery; did work for witness also; that he worked a few days grafting for witness in 1892 or 1893, and that he was in Washington the latter part of 1893 and 1894, because his aunt's husband died in 1894; that Gibson sold his land in Washington in 1890 or 1891, or somewhere along there; that his home was anywhere he saw fit to stop; that he stopped wherever he took a notion to, and that for the last 10 years he has not made his home at Russellville, but has been back and forth all the time; that he could not say whether it has been more his home than any other place.

These witnesses are all more or less indefinite in their testimony with reference to Gibson's place of residence since 1891. It is certain, however, that he was often back and forth between the two states of Oregon and Washington. Mrs. Davis is sure that he made his home in Washington until 1896, at which time she admits that he came to Oregon, and is now making his home here, having been to Illinois in the meanwhile. She says that he made his home with her from the time of the execution of the note until after her marriage with Davis, which was December 14, 1892, when he left there, and made his home at his aunt's in Chehalis County. From this time she is not specific as to his whereabouts and place of residence. She

fixes one winter that he stayed at her aunt's, but otherwise she does not presume to state definitely. Gibson, like her, is indefinite, and not altogether consistent. He says, in effect, that he came to make his home here after making the loan, and before the death of Smith, but seems to admit that he was living at Mrs. Smith's when she was married to Davis. He claims, however, that he left there shortly afterward, and came to Oregon, and that he was back again in Washington at his aunt's only, and stayed there during the harvest of one summer; otherwise that he visited with her and Mrs. Davis occasionally, and that he made his home here in Oregon. As to the relative weight of the testimony of these two witnesses, who are the most vitally concerned in this litigation, there is no appreciable difference, and one will offset the other without giving a preponderance on either side. The testimony of Andrew Lewis is of but little weight. He does not assume to know much about the matter, and what he has to say is of such a confused and uncertain character as to make it very unreliable from which to determine the fact of Gibson's residence since the year 1891.

George Lewis' testimony, upon the other hand, is much more exact and determinate, and in reality the most reliable to be found in the case. Living with his father, as he was, until 1895, and afterward in the same yard, he had a perfect opportunity for knowing whether Gibson made his home there or not, and consequently whether he resided within this state. He says distinctly that Gibson began making his home with his father at Russellville before Smith died in 1891, and has since always made his home there, except that he was away in Washington from time to time, and in later years had been in the State of Illinois. It is quite generally concurred in by all the witnesses that Gibson was in Washington in 1892, and was at Mrs. Davis' a while; but he must have left there the

latter part of the year or early in 1893, soon after she was married to Davis, and it is certain that he has not made his home with her since. He was at his aunt's, Mrs. Isham's, subsequently, and worked for her son through the harvest of one summer while her husband was living—he having died in 1893 or 1894; but it is not established that he ever made his home there, except temporarily while he was at work. He visited there off and on, but never, so far as the record indicates, to take up his residence there. We conclude, therefore, that he took up his residence here in Oregon at least as soon as the early part of 1893, and has so continued to reside here, with the exception of his absence in Illinois, and resides here now.

5. It is argued that, as it is admitted on the part of the administrator that Gibson was a resident of Washington in 1891, it must be presumed that he continued to reside there, and that, therefore, the burden of proof that he changed his residence to Oregon was upon the administrator. The question as to the residence of Gibson arises in this way: The devisees assert in their answer that the cause of action arose between nonresidents of the state, and in this, having alleged it, they have the burden of proof. The administrator merely denies the fact, without attempting to set up where the residence of Gibson was at the time the action accrued. He admits, however, that in 1891 Gibson was a resident of the State of Washington. But we do not understand that this admission has the effect to shift the burden of proof to the administrator to show that the cause of action did not arise between nonresidents of the state. The question is whether, upon all the testimony produced, taking into consideration the presumption that a residence once established will continue until otherwise shown, the devisees have made the better case. When it was admitted that Gibson's residence was in Washington in 1891, the admission made for the devi-

sees a *prima facie* case, and, while it then devolved upon the administrator to overcome this, yet in the end they must show the better case as between them and the administrator upon the question of the cause of action having arisen between nonresidents of this state: *Chaperon v. Portland Elec. Co.* 41 Or. 39, 47 (67 Pac. 928). While the presumption alluded to must be taken into account in determining Gibson's place of residence when the note fell due and his cause of action accrued in 1894, and since that time, yet we think, upon a careful survey of the whole testimony and the credibility to be accorded the witnesses as we go along, that the presumption has not only been overcome, but that the administrator has made the better case; that is, that the preponderance of the evidence in the record is with him. The cause of action not having arisen between nonresidents of the state, the statute of limitations of the State of Washington was not pleadable as a bar to the note.

6. In so far as it may relate to the interposition of our own statute of limitations as a bar, an action upon the note was saved by the payment of the \$456 made by Mrs. Davis thereon March 12, 1896. In this state a payment by one joint maker of a promissory note before the statute of limitations has fully run will continue the liability or right of action thereon as to all, its effect being to continue the original promise: *B. & C. Comp.* § 25; *Partlow v. Singer*, 2 Or. 307; *Sutherlin v. Roberts*, 4 Or. 378; *Creighton v. Vincent*, 10 Or. 56; *Dundee Invest. Co. v. Horner*, 30 Or. 558 (48 Pac. 175). In this view of the fact or question as to Gibson's residence when the cause of action accrued, and the effect of the payment made by Mrs. Davis (Section 4810, Ballinger's Ann. Codes & Stat. Wash.), providing that if any person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action

may be commenced against the representatives after the expiration of that time and within one year after the issuing of letters testamentary or of administration, can serve no purpose, and is without application.

7. Another defense is interposed, based upon a statute of Washington relating to the time of the presentation of the claim against the estate of a deceased person, which provides that, if a claim is not presented within one year after the first publication of the notice to creditors, it shall be barred: Ballinger's Ann. Codes & Stat. § 6228. But it is not shown that any notice was published requiring the creditors of the estate of Charles O. Smith to present their claims to the executors. If it had been, however, it could not help the case, as the will was of the kind known in the State of Washington as a "nonintervention will," and, where the estate is settled outside of the probate court, any notice given would not operate to bar a claim not presented within a year: See Ballinger's Ann. Codes & Stat. § 6196; *Moore v. Kirkman*, 19 Wash. 605 (54 Pac. 24).

8. It is next insisted, although not pleaded as a defense, that Gibson and the administrator have been guilty of such laches in not sooner applying for the appointment of an administrator in Oregon and for the license to sell the real property as to preclude them from now insisting upon subjecting such property to the payment of Gibson's demand. It is doubtful if the question is in the case as the record stands, but we will state our views concerning it briefly, without an elaborate discussion of the authorities. It is said by Mr. Moore in his article on Settlement of Decedents' Estates (19 Enc. Pl. & Prac. 819, 870) that "the right to sell is lost by delay in procuring letters of administration whenever it would be forfeited by a like delay in making application after letters granted." No hard and fast rule has ever been promulgated, so far as we are aware, defining what lapse of time in such a case will amount to

laches, and every case must necessarily be governed by its own particular facts and circumstances. One of two principles is usually applied, namely, where, on account of an unreasonable delay in applying for letters of administration or a license to sell the realty sought to be subjected to a creditor's demand, it is so changed as to ownership or physical conditions as to render it inequitable to the owner to grant the relief; or where, by analogy to the statute of limitations prescribed in the jurisdiction, barring the presentation of the claim or the right to recover the realty, the time having sufficiently run as to bar the relief in that form—the right to the relief by petition for administration and license to sell as here sought will likewise be barred: 19 Enc. Pl. & Prac. 871, 872; *Hatch v. Kelly*, 63 N. H. 29; *Roth v. Holland*, 56 Ark. 633 (20 S. W. 521, 35 Am. St. Rep. 126). Neither of these principles would seem to have application here. As to the former, it does not appear that there has been such a change in the ownership or conditions of the realty concerned as to render its subjection to the payment of the demand in question inequitable in respect to the devisees. As to the latter, no definite time is fixed by our statute for the presentation of claims to an administrator for allowance beyond which the demand will be deemed to be barred, and, in so far as the statute of limitations as it pertains to realty is concerned, it had not yet run when either the application for administration or for license to sell was made, the decedent having died September 15, 1891. So that neither the claimant nor the administrator has been guilty of such laches as will bar the right of the latter to sell the realty.

9. One other question was submitted, which was whether the administrator had sufficiently shown that the personal property had been exhausted. It is alleged by the administrator that no personal property of any kind has come into his hands, and that the only property belonging to the

estate in the State of Oregon is the real property in question. This is admitted by the objections of the devisees to the petition of the administrator, and, having so admitted this necessary jurisdictional fact for a license to sell, they cannot now be heard to say that it is not proven. The decree of the circuit court will be affirmed, and it is so ordered.

AFFIRMED

Argued 21 October, decided 16 November, 1908.

LA VIE v. CROSBY.

[74 Pac. 220.]

EXECUTORY CONTRACT OF SALE—PASSING TITLE—REPLEVIN.

1. Where a contract for the sale of chattels required the seller to perform labor in segregating those sold from a larger quantity, the performance of such act was a condition precedent to the vesting of title in the buyer, and hence the contract was insufficient to entitle the latter to maintain replevin for the chattels sold.

REPLEVIN—AT WHAT TIME VALUE IS TO BE ESTIMATED.

2. Under Section 188, B. & C. Comp., providing that when property has been taken from a defendant in replevin, and in his answer defendant demands a return thereof with damages, he is entitled, if he prevails, to have the property restored to him, and damages for its detention, and if the possession cannot be restored he may recover the value of the property and damages for taking and withholding the same, the value of the property should be fixed as of the date of the verdict.

HARMLESS ERROR.

3. Where, in replevin, it was conclusively shown that the highest market value of the articles was at the time of the trial, an erroneous instruction that, if they could not be redelivered to the defendant, and he was entitled to recover, he would be entitled to the highest market price between the time of the taking and the time of the trial, was harmless, the verdict being for the value at its date.

INTEREST AS DAMAGES IN REPLEVIN ACTIONS.

4. Where, in replevin, it was found that defendant was entitled to a redelivery of the property, and the value thereof was assessed as of the date of the trial, defendant was not entitled to recover interest in addition.

ALLOWANCE OF COSTS TO APPELLANT ON AFFIRMANCE—LAW ACTION.

5. Objection having been promptly taken to a ruling of the trial court, in a law action, whereby the opposite party might have consented to a correction of such ruling, and on appeal it appearing that this ruling constituted the only error, and that it caused an excessive judgment in an ascertainable amount, as the sum allowed as interest, or as damages, the appellant may be allowed his costs, though the judgment is ordered affirmed less the excess.

REVERSAL ON APPEAL—DIRECTING PARTICULAR JUDGMENT.

6. Where a reversible error is one not affecting the general result, but only the particular amount of the judgment, and the corrective information is apparent on the record, the case may be reversed with directions to enter a stated judgment, rather than to hold another trial.

From Marion : **GEORGE H. BURNETT**, Judge.

This is an action by Geo. A. La Vie against A. B. Crosby to recover the possession of a quantity of hops, or the sum of \$2,300, the alleged value thereof, and damages for their detention. The facts are that defendant entered into a contract with plaintiff, whereby he stipulated to sell and transfer to him 10,000 pounds of "choice" hops at eleven and one half cents per pound, to be grown in Marion County, Oregon, in 1902, and to pick, cure, bale, and deliver the same on or before October 31st of that year, any advances made by plaintiff on account thereof to be a lien on the crop. The defendant received one dollar at the time the agreement was entered into, and thereafter \$100, which sums, with interest thereon, were tendered to the plaintiff, but upon his refusal to accept the money it was deposited in court for him. The defendant, contending that plaintiff had not kept his part of the agreement, refused to deliver the hops, whereupon this action was instituted, and upon claim of immediate delivery to him the plaintiff secured possession thereof, and shipped them out of the state, as is alleged in the answer, to defendant's damage in the sum of \$2,700. The cause, being at issue, was tried, resulting in a judgment that defendant was the owner of the hops, and entitled to their immediate possession, or, if possession could not be had, to the sum of \$2,600, the value thereof, and also to the sum of \$50 as damages for the wrongful taking and detention, and plaintiff appeals.

CONDITIONALLY AFFIRMED.

For appellant there was a brief over the names of *Peter H. D'Arcy*, *Carson & Adams*, and *John M. Gearin*, with an oral argument by *Mr. D'Arcy* and *Mr. Loring K. Adams*.

For respondent there was a brief over the names of *H. Overton*, *L. J. Adams*, and *Geo. G. Bingham*, with an oral argument by *Mr. Bingham* and *Mr. Overton*.

MR. CHIEF JUSTICE MOORE, after stating the facts as above, delivered the opinion of the court.

1. The contract sued on being executory, and similar to the agreement set out in the case of *Backhaus v. Buells*, 43 Or. 558 (73 Pac. 342), this action cannot be maintained.

2. The defendant, in his answer, having demanded a return of the hops, or the value thereof, and damages for their detention, the only question involved is the measure of compensation to which he is entitled. All the testimony given at the trial having been incorporated in the bill of exceptions, it appears therefrom that the value of the hops of the quality in question at Woodburn, Oregon, when seized at that place by the plaintiff, to wit, October 23, 1902, was from twenty to twenty-three cents per pound, and on February 17, 1903, when the action was tried, the value thereof was estimated by the witnesses to have been from twenty-four to twenty-six cents per pound. The court, referring to such testimony, charged the jury as follows:

"You will therefore assess the value of the whole lot of hops in question, as described in the complaint, remembering the limit, the minimum price being \$2,300 and the maximum price being \$2,700, and you will be entitled to find the value at any time between the time of taking the hops on the 23d day of October and the present time. The defendant would be entitled to recover on the question of value the highest market price between the time of the taking and the present time. The measure of his damages would be the interest on the value of the hops from the time of taking at the rate of six per cent per annum until the present time."

The plaintiff's counsel, having excepted to that part of the charge, contend that the court erred in giving it. The statute prescribing the form of judgments to be rendered in actions of this kind is as follows: "In an action to recover the possession of personal property, judgment for

the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for the detention thereof. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same": B. & C. Comp. § 198. In the absence of fraud or malice the damage recoverable in an action of replevin is limited to compensation for the loss sustained in consequence of the wrongful taking or unlawful detention of the property: 24 Am. & Eng. Ency. Law (2 ed.), 512; Shinn, Replevin, § 644; Weeks, Replevin, § 530. When property has been taken from the defendant in such an action in pursuance of the statute, and in answer he demands a return thereof and damages, if he prevails he is entitled to have it restored to him and damages for its detention; but, if the possession cannot be had, he is entitled to recover the value thereof and damages for taking and withholding the same, and also such special damages as he may allege and be able to prove at the trial: B. & C. Comp. § 198; Cobby, Replevin (2 ed.), § 856; *Sherman v. Clark*, 24 Minn. 37.

The compensation which the prevailing party is entitled to recover when he cannot secure the possession of personal property of which he has been deprived is well settled, but at what time the value thereof should be determined by the jury, the decisions of the courts are not in accord. Mr. Shinn, in his work on Replevin (section 626), in discussing this question, says: "Upon a casual examination of the decisions and of different statutes regarding the time which shall be considered by the jury as that at which the value shall govern, the cases seem to divide themselves into two distinct classes; but upon a more minute examination it is found that the distinction between the classes is more apparent than real. The courts

intend that the damages shall be compensatory, and, although certain states hold that the value in replevin shall be assessed as at the time the cause of action accrued or when the action was begun, and others that it is the value of the goods at the time the verdict is rendered, yet they all require the assessment of damages for detention, and take into consideration as a measure thereof the depreciation in the value during such time, and all likewise consider the appreciation because of increase in value occasioned by labor or otherwise." The statute prescribing the form of verdict in such cases is as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property": B. & C. Comp. § 153. The statute just quoted being silent in respect to the time when the value of the property taken from the prevailing party is to be assessed when a return thereof cannot be had, it is susceptible to such construction as will make it the duty of the jury to determine such value either when the property was taken or at the time of the trial, as may best seem to promote substantial justice.

"The primary purpose of replevin," says Mr. Justice AGNEW, in *Herdic v. Young*, 55 Pa. St. 176 (93 Am. Dec. 739), "is to recover the property in specie, not its value." A text-writer, in distinguishing between the compensation to be awarded to the injured party in certain cases, says: "The essential distinction between trover and replevin as regards the rule of damages, aside from the element of

willfulness in the taking or detention, is briefly this: In trover the title to the property is regarded as having passed to the defendant, who is therefore liable for its value, simply, with interest. In replevin the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself, or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit": Sedgwick, Damages (8 ed.), § 528. Notwithstanding it is alleged in the answer that plaintiff had shipped the hops in question out of the state, if they are in existence in the same condition as when taken, a return thereof before a levy of the writ of execution has been made would satisfy the alternative part of the judgment: *Marks v. Willis*, 36 Or. 1 (58 Pac. 526, 78 Am. St. Rep. 752); *Leve v. Frazier*, 42 Or. 141 (70 Pac. 376). The title to personal property, the right to the possession of which is in litigation, being treated, notwithstanding its seizure, as in the prevailing party in the action for its recovery, it would seem upon principle that under a statute like ours the jury should determine its value as of the date of their verdict. If assessed at that time, and the value of the property be greater than when it was taken or detained, the prevailing party would secure the advantage of the appreciation; but, if the value were less, damages could be awarded him for the depreciation. This method will probably result in every instance in determining the value of the property at the time it was taken or detained, together with the appreciation, if any, at the time the verdict was rendered, thereby excluding intermediate values of unstable commodities the prices of which fluctuate.

The value of property being assessed at the time the verdict was rendered would necessarily exclude the allowance of interest as damages, except possibly for the retention of money in specie, but damages for the use of property that could be employed might be awarded: *Coffin v. Taylor*, 16

Or. 375 (18 Pac. 638). If a prudent person has a commodity for sale, he must know the market value thereof, and usually studies the question of supply and demand in respect thereto, to anticipate, if possible, what the future price may be; and if, after such consideration, he concludes that the value must appreciate to such an extent as to justify his holding the property until his expectations are realized, his hope would be dissipated, and he doomed to disappointment, if his adversary could, under the forms of law, secure the possession of the property, and ship it out of the state, and, when called upon for damages, tender the value of the property at the time he seized it, and interest, in disregard of its possible increase in value, such a rule would be to permit him to take advantage of his own wrong. We think reason supports the rule that the value of the hops should have been assessed by the jury as of the time when the verdict was rendered.

3. As the uncontradicted testimony conclusively shows that the highest market value was at that time, no injury could have resulted to the plaintiff from the giving of the erroneous instruction in respect to the time when the value was to have been determined.

4. We think, however, from what has been said, that an error was committed in charging the jury that the defendant was entitled to interest from the time of the taking of the hops. Where the rule prevails that the value of the property shall be assessed as of the time it was taken or detained, interest is usually allowable as a measure of damages; but where the value is fixed at a subsequent time it is improper to allow interest on the value from the taking, for this would be awarding double damages: *Cobbey, Replevin*, § 878.

5. The defendant's counsel at the trial in this court offered to remit the sum of \$50, the damages found by the jury, but, not having done so in the lower court, and the

exception having particularly challenged that part of the instruction which related to the interest, the plaintiff will be entitled to his costs in this court.

6. The judgment will therefore be affirmed, except as to the damages remitted, and the cause remanded, with directions to enter an alternative judgment for the sum of \$2,600, with interest from February 17, 1903.

CONDITIONALLY AFFIRMED.

Argued 7 January, decided 1 February, 1904.

HALL v. HALL.

[75 Pac. 141.]

DIVORCE — EVIDENCE OF ADULTERY.

The evidence in this case having shown appreciable familiarity between the defendant and a neighbor who lived at her home during her husband's absence, and it appearing that there was ample opportunity for meetings, the positive statement of the husband that on unexpectedly appearing at his home early in the morning he saw his wife in bed with the neighbor will outweigh the denials of the parties involved, and a divorce should be granted for adultery.

From Clackamas: THOS. A. McBRIDE, Judge.

Suit by Wm. H. Hall against Laura C. Hall for a divorce on the ground of adultery. Plaintiff appeals from a decree dismissing his suit. **REVERSED.**

For appellant there was a brief over the names of *Winfield S. Ward* and *Wm. M. Gregory*, with an oral argument by *Mr. Gregory*.

No appearance or brief for respondent.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit for a divorce instituted by the husband on the ground of adultery, alleged to have been committed by the defendant with one Silas Hedges. The answer denies this accusation, and by way of cross-bill alleges that plaintiff has been guilty of cruel and inhuman treatment, rendering defendant's life burdensome, by falsely accusing and charging her with the commission of a crime as stated. The averments of new matter in the answer were

put in issue by the reply, and, the cause being tried, the suit was dismissed and plaintiff appeals. The testimony shows that the parties were married January 21, 1893, and soon thereafter moved to a homestead in Clackamas County on which the defendant lived, the plaintiff working in Portland and sending his wages to her. Silas Hedges owned land near theirs, and, having no wife, he made his home at the plaintiff's for several years, Mrs. Hall doing his washing and mending, for which service he paid her. The plaintiff, becoming suspicious, left Portland, arriving at his homestead about 1 o'clock at night, and, sleeping in an outbuilding until 7 o'clock the next morning, he went to the house, and found Hedges, as he testifies, lying in bed with his wife. He thereupon accused her of committing adultery with Hedges, who immediately left the premises. The defendant, as a witness, denies that she was guilty of any improper relations with Hedges, and he, as her witness, corroborates such statement. If the plaintiff's testimony is to be believed, an error was committed in refusing to grant the relief which he demands.

It appears from the transcript that he consulted a "medium" in Portland, in whose counsel he placed great reliance, and became very angry when told that such communications were untrustworthy. In June, 1902, his wife wrote him that one of their cows had died, and, concluding from the medium's suggestion that Hedges had killed her, he secured a pistol, and started for his homestead, threatening to shoot him, but returned without executing his purpose. In a letter written to his wife, and offered in evidence, he states that on September 8, 1902, at Portland, more than forty miles from his homestead, he could hear her and Hedges talking from 9 o'clock at night until 5 the next morning, their voices sounding as if transmitted by telephone. That the plaintiff's mind was feeble must be admitted, and it may be that his distorted reason accounts

for the statement that he found Hedges and his wife occupying the same bed. There are many circumstances, however, relating to the conduct of Hedges and Mrs. Hall, which, without detailing them, lead us to believe plaintiff told the truth, and that he is entitled to a legal separation from her. The decree of the lower court will therefore be reversed, and one entered here dissolving the bonds of matrimony heretofore existing between the parties.

REVERSED.

Argued 20 October, decided 16 November, 1903.

ANDERSON v. ADAMS.

[74 Pac. 215.]

AGENTS—IMPLIED WARRANTY OF AUTHORITY—DAMAGES.

1. Where an agent makes a contract on behalf of his principal in excess of his authority, he is personally liable thereon, under an implied warranty of authority, even though he made no false representations concerning his authority.

FORM OF ACTION ON BREACH OF AUTHORIZED CONTRACT BY AGENT.

2. In an action against an agent for damages caused by not complying with a contract on behalf of his principal in excess of his authority, in which there is no allegation that defendant falsely represented himself to be the agent of the party in whose behalf the contract was made, the action is in contract for breach of an implied warranty of authority and not in tort for deceit.

ADMISSIONS AGAINST INTEREST AS EVIDENCE.

3. Under the general rule that admissions against interest are competent evidence against one making them, it is competent and material, in a damage action against an agent for not performing a contract that he had made without authority, to show that after the contract was made the agent stated that he had no authority from his principal to make it.

ACT OF GOD AS A JUSTIFICATION FOR A BREACH OF A CONTRACT.

4. In an action against an agent for a breach of a contract made by him in excess of his authority, to furnish water to irrigate land which he, on behalf of his principal leased to plaintiff, defendant pleaded that he was prevented from performing the contract by an act of God, and during the trial his counsel offered to show that the land was under two ditches, that the old one was so low that it was impossible to irrigate any of the land from it, and that the new one was so nearly level that while in ordinary seasons it would furnish a supply of water, yet, in consequence of the drought in the season covered by the contract, no water would flow therein. *Held*, that the offer did not tend to show a failure to perform because of an act of God, as there was no offer to prove that the water supply of the ditch had ceased to exist, but tended to show only that the land could not be watered that summer from either of the ditches referred to. To excuse performance it should have been shown that the irrigation was or had become physically impossible of accomplishment.

EVIDENCE AS TO VALUE OF LOST CROP.

5. In an action for damages suffered by loss of a growing crop through failure to provide water as contracted for, it is competent to show the condition of the

43	621
44	529
43	621
46	156
46	271
46	392

crop at the time when irrigation was necessary and the probable yield had the water been furnished.

AGENCY—QUESTIONS FOR COURT AND JURY RESPECTIVELY.

6. Whether a person was or was not the agent of another is a question of fact for the jury, but what may be done by the agent under the power conferred is a question of law for the judge.

EVIDENCE OF TERMS OF AGENCY.

7. The evidence offered herein on the question of the extent of the agency involved does not show that defendant had authority from his principal to make the contract he did make.

COSTS OF APPEAL ON CONDITIONAL AFFIRMANCE.

8. Where it appears that a judgment is erroneous only in an ascertainable amount, caused by an error in computation, or in allowing interest by mistake, or the like, costs should be allowed the appellant, though the case is practically affirmed, provided the error was noted and objected to when made. If the attention of the trial court could have been, but was not, called to the error, the penalty is the payment of the costs; but if the adversary had an opportunity to remit the excess before the appeal, and would not, he must pay the costs.

DIRECTING PARTICULAR JUDGMENT.

9. The facts being undisputed, a judgment in a law action may be affirmed on condition that a specified and evident excess be remitted, and the case remanded with direction to enter a stated judgment.

From Klamath: HENRY L. BENSON, Judge.

This is an action by R. C. Anderson to recover damages from J. F. Adams, an agent, for the breach of an agreement claimed to have been made in excess of his authority. It is alleged in the complaint, in substance, that about February —, 1898, the defendant, representing that he was the authorized agent of one Jesse D. Carr, entered into an oral agreement whereby he leased to plaintiff, until October 15th of that year, 120 acres of land in Klamath County, stipulating to construct all ditches necessary, and furnish water sufficient to irrigate a crop of wheat to be grown thereon, in consideration of which plaintiff agreed to plow the land, sow the grain, properly care for and tend the same, and at threshing time deliver to defendant and Carr, at Brandon Bros.' mill at Merrill, in said county, one fourth of the grain so raised; Carr to have all the straw, and the right to pasture said leased land after the threshing; that, in pursuance of said agreement, and relying upon and believing the representations of the defendant that he was

the authorized agent of Carr, and that he had full authority to make said contract, plaintiff entered into possession of said premises, put in the crop, and in all respects fully complied with the terms and conditions of the agreement, so far as he was permitted by the defendant and Carr; that the land so leased is situated in an arid region, unproductive without irrigation, which was well known to Carr and the defendant, who, though often requested so to do, failed to furnish water to irrigate said land during the season of 1898, by reason whereof said crop dried up and became a total failure; that if water had been furnished, sufficient for such irrigation, plaintiff would, after paying all expenses, have realized from his share of the crop \$1,185, in which sum he was damaged by the failure of defendant and Carr to keep and perform the conditions of said agreement, no part of which sum has been paid; that Carr, denying the authority of the defendant to make said contract, has repudiated the same, and plaintiff alleges that defendant entered into it in the name of Carr without authority. Judgment is demanded for the sum of \$1,185, with interest from February —, 1898, at the rate of 8 per cent per annum.

A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and that two causes were improperly united, having been overruled, an answer was filed, denying the material allegations of the complaint, and, for a further defense, setting out what purports to be a copy of the lease of said premises, prepared by the defendant, but not signed by the parties, wherein it is stipulated that the lessor would furnish water from the Little Klamath Ditch sufficient to irrigate said tract, where practicable. For a second defense it is alleged that the spring and summer season of 1898, in the vicinity of said land, was unusually dry, and the drought such as was not contemplated by either party, and could not have been anticipated or provided against

by the exercise of ordinary diligence or foresight, and by reason thereof the water supply of the Little Klamath Ditch receded to such an extent that, excepting a small stream, it ceased to flow therein, and could not be furnished therefrom to irrigate the demised premises during the greater part of the irrigating season, but that defendant, as the agent of Carr, furnished to said land all the water that could or would flow in the ditch ; "that there was no source of water supply by which said lands, or any part thereof, could have been irrigated through said Little Klamath Water Ditch, during the irrigating season of the year 1898, and that there was no other source of water supply by which it was practicable to irrigate said lands, or any part thereof, during the irrigating season of said year;" that any failure by Carr or the defendant, as his agent, or otherwise, to furnish more water than was supplied, was caused by the act of God, whereby they were excused. For a third defense it is alleged that on March 27, 1898, Carr, at plaintiff's request, loaned him the sum of \$75, which he agreed to repay October 15th of that year, with interest at the rate of 10 per cent per annum from the date of the loan ; that no part thereof has been paid ; and that, prior to the commencement of this action, Carr, for a valuable consideration, assigned said claim to the defendant, for the amount of which he prays judgment. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a verdict for plaintiff, assessing his damages at \$726.75, and awarding him interest thereon at the rate of 6 per cent per annum from November 13, 1898, amounting, with the principal, to \$901.19 ; and judgment having been rendered in accordance therewith, the defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. W. Hamaker*.

For respondent there was a brief over the names of *Hiram F. Murdoch* and *Austin S. Hammond*, with an oral argument by *Mr. Hammond*.

MR. CHIEF JUSTICE MOORE, after stating the facts as above, delivered the opinion of the court.

1. It is contended by defendant's counsel that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the demurrer. It is argued that, as no fraud is alleged in the complaint, an action of deceit cannot be founded thereon, and, inasmuch as the damages sought to be recovered are based upon the contract, and not upon the injury resulting from the defendant's alleged want of authority to enter into the agreement, the action cannot be maintained upon the theory of an implied warranty of such authority. Though there is a conflict of judicial utterance in respect to the form of action against an agent who has honestly, but erroneously, exceeded his authority, it has been held in this state that an agent who makes a contract on behalf of his principal in excess of his authority is, on the repudiation of the agreement by the principal, personally liable thereon, though he made no false representations concerning his authority, and, as he impliedly warranted that he was empowered to make the contract, the action will be construed as in contract, instead of in tort: *Cochran v. Baker*, 34 Or. 555 (56 Pac. 641). In deciding that case, Mr. Chief Justice WOLVERTON, speaking for the court, said: "The agent, by undertaking to act for another as his principal, tacitly and impliedly represents himself to be authorized, as a matter of fact, to so act, and becomes liable if it appears that he assumed as true that which he did not know to be so. The reason upon which the liability is founded is that the party dealing with a supposed agent is deprived of any remedy upon the contract against the principal.

The contract, though in form that of the principal, is not his in fact, and, of course, is not susceptible of enforcement against him; and, as the loss must fall somewhere, it is but a rule of justice that it should be borne by him whose acts made it possible." Though the agent who has exceeded his authority cannot be sued on the contract itself, as a party thereto, unless it contains apt words to charge him (1 Am. & Eng. Ency. Law, 2 ed., 1128; Story, Agency, 9 ed., § 264a; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64), an action may be maintained against him on his implied promise that he had authority to bind the principal: *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525 (26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846). This promise is not a part of the agreement supposed to have been entered into with the principal, but independent thereof, and tantamount to an implied warranty that, if a third party will enter into a contract with the agent on behalf of his principal, he will indemnify such party against any loss that he may sustain, if it shall be ascertained that he does not possess the measure of authority which he assumes. Such warranty being impliedly given, it cannot be said that in enforcing it the court makes a new contract for the agent and a third party. We are satisfied with the rule announced in *Cochran v. Baker*, 34 Or. 555 (56 Pac. 641), and think no error was committed in construing the complaint as an action *ex contractu* on the implied warranty, or in overruling the demurrer.

2. The plaintiff having submitted his testimony and rested, defendant's counsel moved the court for a judgment of nonsuit, on the ground that the action was for the alleged fraud and deceit of the defendant in falsely representing himself to be the agent of Jesse D. Carr, and that he had failed to produce any evidence to support such allegation; but, the motion having been denied and an exception saved, it is contended that an error was thus

committed. It is nowhere alleged in the complaint that the defendant "falsely" represented that he was Carr's agent, and, this being so, we do not think the action is in tort for deceit, but in contract for an alleged breach of the defendant's implied warranty. In an action for deceit, the plaintiff must set out in the complaint the representation, and allege the falsity thereof: 8 Ency. Pl. & Pr. 899. To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of matter relating to the contract about which the representation was made, which, if true, would have been to plaintiff's advantage, but, being false, caused him damage and injury: *Rolfes v. Russel*, 5 Or. 400; *Grangers' Market Co. v. Vinson*, 6 Or. 172; *Dunning v. Cresson*, 6 Or. 241; *Britt v. Marks*, 20 Or. 223 (25 Pac. 636); *Schoellhamer v. Rometsch*, 26 Or. 394 (38 Pac. 344); *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656); *Martin v. Eagle Develop. Co.* 41 Or. 448 (69 Pac. 216). The plaintiff's counsel, evidently intending to frame the complaint so as to avoid any controversy in respect to the form of action, omitted the averments required in an action of deceit; thus showing that he based the relief sought in contract for the breach of the implied warranty.

3. It is argued in the defendant's brief that, as the gist of the action is based upon the defendant's want of authority, the burden was imposed upon the plaintiff to prove that Carr had not vested the defendant with the measure of power assumed by him, and that, no testimony having been offered on this subject, an error was committed in not granting defendant's motion for a judgment of nonsuit. The point thus insisted upon was not called to the attention of the trial court, but, if it had been, we think

there was sufficient testimony introduced by plaintiff to show that the contention is without merit. The bill of exceptions discloses that testimony was offered tending to show that Jesse D. Carr, a resident of Salinas, California, owned a section of land in Klamath County, which he caused to be cleared of sagebrush, and appointed the defendant as his agent to lease it for the purpose of raising grain, so that the land might be brought into proper cultivation for the growth of alfalfa thereon. In pursuance of such appointment, the defendant, as Carr's agent, leased 120 acres of said land to plaintiff, and, honestly supposing he had authority to furnish water for irrigation, stipulated to do so; but, no water having been supplied, the crop of wheat sowed on the land by plaintiff was destroyed. The complaint having alleged that the defendant had no authority on behalf of his principal to stipulate to furnish water for irrigation, the burden was assumed by the plaintiff to prove the fact so stated: *Noe v. Gregory*, 7 Daly, 283. The plaintiff, as a witness in his own behalf, was asked whether he had ever heard the defendant say, since said crop of wheat was destroyed, that he had authority to furnish water for irrigation. An objection to the question on the ground that it was incompetent and immaterial having been overruled, and an exception allowed, the witness replied: "He said he didn't have no authority to furnish water. That is what he said on the stand — that he didn't have no authority to furnish water." The stand referred to in the answer was the witness stand, and the declaration so imputed to the defendant is the testimony which he gave as a witness in the action of *Durkee v. Carr*, 38 Or. 189 (63 Pac. 117), involving Carr's liability on his stipulation to furnish water to another party for irrigation. No objection to the question propounded to the plaintiff was interposed on the ground that a proper foundation therefor had not been laid, or that the time, place, and persons present

had not been detailed with particularity, so as to call the attention of the witness thereto, for, if the objection had been based on these grounds, it would doubtless have been sustained; but, as made, it was not well taken, and therefore properly overruled. The plaintiff having testified that the defendant, on the witness stand, admitted at the trial of another action that he had no authority on behalf of Carr to furnish water for irrigation, affords some evidence from which the jury might conclude that, in making the contract entered into with the plaintiff, the defendant exceeded the power delegated to him. The plaintiff's testimony is corroborated by that of the witness Bert Davis, who testified that he was present in court at the trial of the said case of *Durkee v. Carr*, the nature of which action he explained; and, referring to the defendant's testimony given at that trial, he said: "I remember when they asked him if he had authority to furnish water, and he said he didn't. I remember that very distinctly." The declarations so imputed to the defendant were against his interest, and therefore admissible (*White v. Madison*, 26 N. Y. 117), and hence no error was committed in overruling the motion for a judgment of nonsuit.

4. The defendant, as a witness in his own behalf, was asked on direct examination to state what the relative difference in elevation was between the old and the new ditches extending from the Little Klamath Ditch to the demised premises. An objection to the question having been interposed on the ground that the answer sought to be elicited was irrelevant and immaterial, the defendant's counsel thereupon stated to the court that they expected to show by the witness that the level of the old ditch was so low that it was impossible to irrigate any part of Carr's land from it, and that the new ditch, by which a part of the said section could be covered, was so nearly level that water would not easily flow therein, and was subject to

evaporation, requiring more water to get it through, and that, while in ordinary seasons the new ditch furnished a supply of water, in 1898, in consequence of the drought, no water would flow therein. The objection having been sustained, an exception was allowed; and it is contended by defendant's counsel that the testimony so offered was material, as tending to support the issue of the act of God, and that the court erred in excluding it. In *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354, 21 L. R. A. 726), in commenting upon the act of God as an excuse for the nonperformance of the conditions of an agreement, it is said: "It is a well recognized principle of law that, when it is apparent that the parties have contracted on the basis of the continued existence of a given thing, then, on performance becoming due, if, without the fault of the parties, the thing has ceased to exist, the case has become one of mutual mistake, and the duty to perform no longer remains." Whether or not the drought in 1898 so affected the body of water from which the demised tract of land was to be irrigated as to cause the source to cease to exist, does not appear from inspection of the bill of exceptions, and the question so objected to appears only to go to the practicability of irrigating the leased land by means of a particular ditch. "It is a well established rule of law," say the editors of the *American & English Encyclopedia of Law* (2 ed.), vol. 1, p. 588, "that, where a person creates a charge or obligation upon himself by express contract, he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impracticable." In *Reid v. Alaska Packing Co.* 43 Or. 429 (73 Pac. 337), Mr. Justice BRAN, commenting upon this legal principle, says: "Before one can be excused, however, from the performance of a valid contract, deliberately entered into, because of the impossibility of performance, it must appear that the thing agreed to be done is impossible upon its face, and cannot, by any

means, be effected. It is no excuse for the nonperformance of a contract that it is impossible for the obligor to fulfill it, if the performance be in its nature possible." The question relating to the difference in elevation of the respective ditches, and the statement of defendant's counsel of what they expected to show if the witness was permitted to answer the question propounded to him, does not tend to show that the source of the water was wholly exhausted, so as to render the irrigation of the land physically impossible; and for this reason the act of God is not involved, and no error was committed in sustaining the objection to the question asked.

5. It is maintained that the court erred in permitting the plaintiff, over the defendant's objection and exception, to introduce testimony tending to show the condition of the crops on the leased land, and the probable yield of wheat therefrom if the premises had been irrigated. It is argued that, notwithstanding the land in question may have been properly irrigated, the wheat grown thereon might have been injured by frost, smut, or rust, which the testimony shows are hindrances to the growth of wheat in that vicinity, thus rendering the opinion of plaintiff's witnesses as to the probable quantity of wheat that could have been grown mere guesses, and therefore incompetent. It is incumbent upon a party always to offer the best testimony that is in his power to secure, the presumption being that higher evidence would be adverse from inferior being produced: B. & C. Comp. § 788, subd. 6. This rule narrows the inquiry to a consideration of whether or not the method adopted by plaintiff to prove the extent of his injury was the best that the circumstances afforded. The damage which a party has sustained in consequence of the breach of an agreement or of the act or neglect of another is in nearly every instance problematical, and can rarely ever be reduced to a mathematical certainty. Evi-

dence, therefore, that tends in any manner to establish the measure of the injury sustained, is admissible, if it is the best that can be secured. The testimony shows that plaintiff had plowed the land and sowed the wheat, which came up and grew until it withered and died for want of water. The crop therefore had a potential existence, and was of some value, the measure of which at the time of its destruction might have been no greater than the value of the wheat as pasture; but, as the plaintiff had a right to suppose that the water agreed to be furnished would be supplied, the damage he sustained was greater than the value of the grain for the purpose assumed. If there was no demand for the growing grain for feeding purposes, the fact that it may have been worth a few cents per acre as a fertilizer to the land does not fix the extent of the damage sustained. The wheat was sown with the expectation of harvesting it, and the measure of damages for the loss of the crop is more than the cost of plowing and the value of the seed (*Gulf, Colo. & S. F. Ry. Co. v. Carter* [Tex. Civ. App.] 25 S. W. 1023), and is equal to the value of the crop in the condition it was before it perished: 8 Am. & Eng. Ency. Law (2 ed.), 330. Evidence of the value of the crop at maturity, less the cost of the labor, care, and attention necessary to put it in condition for the nearest market, is admissible, in connection with other evidence to enable the jury to ascertain the amount of damages sustained: *Gulf, Colo. & S. F. Ry. Co. v. Carter*, 25 S. W. 1023; *Shotwell v. Dodge*, 8 Wash. 337 (36 Pac. 254). The extent of the crop at maturity is the quantity that would probably have been produced under the conditions agreed upon. To determine such quantity, witnesses who were conversant with the land in that vicinity, and knew from experience or observation the amount of wheat that could ordinarily be grown on an acre of such land when irrigated, were competent to express an opinion as to the number of

bushels that could be produced. If the defendant thought the witnesses overestimated the quantity that could have been grown under the circumstances adverted to, he could undoubtedly have secured competent persons who would have made a fair estimate thereof; and, as this method of proving the value of the crop at the time of its destruction was the best that could have been devised, no error was committed in admitting the testimony so objected to.

6. The defendant, as a witness in his own behalf, having testified that the authority given him to enter into a contract with the plaintiff was derived from letters received from Carr, offered in evidence letters purporting to have been written by him November 24 and December 4, 1897, and July 5, 1898, which are referred to in the bill of exceptions as Exhibits A, B, and C, respectively. His counsel at the proper time requested the court to charge the jury in respect thereto as follows:

"I instruct you, as a matter of law, that if you are satisfied, as reasonable men, by the evidence, that J. D. Carr wrote the letters to Mr. Adams which have been filed in evidence herein as defendant's Exhibits A, B, and C, these letters gave defendant authority to make such contract for said Carr as the one set out in the complaint, and you should find for the defendant."

The request not having been granted, an exception to the court's refusal so to charge was saved, and it is insisted by defendant's counsel that an error was thereby committed. The existence of an agent's authority is a question of fact to be ascertained by the jury, but what the agent may do under the power conferred is a question of law to be determined by the court: *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Long Creek Building Assoc. v. State Ins. Co.* 29 Or. 569 (46 Pac. 366).

7. Carr, in the letter of November 24, 1897, evidently referring to some prior conversation with or communication

from the defendant, says: "I think your proposition was to furnish these parties with water the first year free." The parties here mentioned are the persons whom the defendant might secure as tenants for Carr's land. Further in the letter the writer says: "Whenever the time comes that we can get grain out of the country, I am willing to go to the expense of irrigating all my land that I can irrigate down at home and up on that section, but until that time I do not propose to spend any more money down there at home irrigating." In the letter of December 4, 1897, Carr, in referring to the letting of his land, wrote the defendant as follows: "I leave the terms of the lease and the share of the crop, etc., entirely with you, but I do not want the land leased for more than three years. I have so much money in that country now that when I come to think of it I was very foolish and hasty to undertake to do anything with that section, but I did it partly to assist you in your ditch matters, as you cannot keep up your ditch unless you can get some customers." It will be remembered that these letters were written prior to the leasing of the land to plaintiff. In the letter of July 5, 1898, Carr writes as follows: "I am sorry to hear your doleful report about the water in the ditch. I sincerely hope you were mistaken and that the water will hold out; but, of course, you cannot supply the people with water unless you can get it. If you can get water, help my boys all you can on the section." The letters so introduced in evidence may not have been all that the defendant received from Carr in relation to the leasing of his land; but, from the excerpts taken therefrom, we do not think the agent was authorized to furnish water for irrigation on the principal's account. It is true, Carr says, "I leave the terms of the lease and the share of the crop, etc., entirely with you;" but as he had prior thereto expressed his unwillingness to go to the expense of irrigating his land until the grain that might

be grown thereon could be transported from Klamath County by rail, this negatives the idea that the term "etc." authorized the furnishing of water, and no error was committed in refusing to give the instruction requested.

8. The court, instructing the jury on the measure of damages, said:

"In determining the value of such crop, you may take into consideration the value of the crop that would have been produced upon said lands if the same had been irrigated, after deducting all expenses of maturing, harvesting, and marketing said crop, if all these items are shown by the evidence not to exceed \$1,185, together with interest at 8 per cent from the date such crop was destroyed."

The plaintiff's counsel concede that the damages sought to be recovered were unliquidated, and that no interest could be recovered thereon until judgment was rendered therefor, and offer to remit \$174.44, which the verdict shows that the jury awarded on account of interest. The language quoted is a part of an instruction, to the giving of which the defendant excepted, without calling particular attention to the question of interest. It is probable, if this part of the charge had been particularly challenged, the court would have corrected it. If not, the defendant would have been entitled to his costs in this court on the appeal; but, not having done so, the interest will be remitted without allowing costs to the defendant.

It was suggested at the trial in this court that it was incumbent upon the plaintiff to negative in the complaint the possibility of his securing water for irrigation from other sources after the defendant failed to supply it, but, if this were so, the answer performs that service, and shows that the water could not have been so obtained.

9. Other errors were assigned, but, deeming them unimportant, the judgment will be affirmed, except as to the amount of interest, and the cause remanded, with direc-

tions to the trial court to enter a judgment for the sum of \$726.75, with interest from November 14, 1902.

CONDITIONALLY AFFIRMED.

Decided May, 1902.

McAULIFF'S WILL.

From Baker: ROBERT EAKIN, Judge.

This is a contest of the will of Dennis McAuliff, by Mary Foster, which resulted against the contestant. This appeal resulted.

AFFIRMED.

Mr. William J. Lachner for appellant.

Mr. Julius C. Moreland and *Mr. John L. Rand* for respondents.

On stipulation of the parties the decree sustaining the will was affirmed. No opinion.

AFFIRMED.

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1. Under B. & C. Comp. § 891, providing that in an action at law, where defendant is entitled to equitable relief, he may, on answering, file a complaint in equity, which shall stay the proceedings at law, and the case shall thereafter proceed as in equity, when such proceedings may be enjoined or allowed to proceed, the equity court does not obtain jurisdiction over the original action, but it remains simply in abeyance until the equity suit is decided, when it is either enjoined or released, and as to this latter alternative, the absence of a restraining clause in the decree is practically a permission to continue the original proceeding at law.

Finney v. Egan, 1.

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2. Rights of action must of necessity accrue when and where the acts creating the right occur, and particularly is this true of rights created by statute, which of course have no extraterritorial effect. *Bergman v. Inman*, 456.

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Plaintiff having purchased land adjoining defendant's house, and being about to erect houses thereon, defendant threatened to erect a high fence, and their difficulties resulted in a contract whereby plaintiff sold defendant a strip of land lying next to that of defendant, and it was agreed that no house should be erected on the strip, and that no fence, other than a wire or iron one six feet high, should be erected "on the north line of the strip." Subsequently defendant undertook to erect on the strip, but not on the boundary line, a high board fence which was to be painted black. *Held*, that the erection of such fence would be enjoined, as within the meaning of the contract. *Silverfeld v. Frank*, 502.

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1. Sections 441, 442, and 444, B. & C. Comp. contemplate an interlocutory decree defining the rights of the respective parties in the land of which partition is desired, and deciding whether it shall be divided or sold, to be followed by a final decree upon a consideration of the report of the referees, and this last is the final order contemplated by Section 517, B. & C. Comp. that must be appealed from, though on the appeal intermediate orders involving the merits, and necessarily affecting the decree, may be reviewed. *Sterling v. Sterling*, 200.

RIGHT OF REVIEW—APPEALABLE INTEREST OF ADMINISTRATOR.

2. An administrator has an appealable interest in an order of a county court dismissing his petition for a license to sell property of the estate to pay a claim which has been allowed. *Smith's Estate*, 505.

RESERVATION OF REVIEW—EXCEPTION TO INSTRUCTIONS.

3. An exception to a part of a charge, particularly setting out the language complained of, is sufficient to raise the question of the accuracy of that part of the charge so specified. *Scott v. Astoria Railroad Co.* 26.

WIDOW AS ADVERSE PARTY IN SALE OF REALTY.

4. The widow is not a necessary or even a proper party to a proceeding to procure the sale of the realty of a decedent to pay debts, and is therefore not an adverse party to any appeal. *Smith's Estate*, 505.

TRANSFERRING CAUSE—FILING TRANSCRIPT.

5. Where a statute requires that a transcript, for example, shall be filed with the clerk of the appellate court by a certain time after perfecting the appeal, and that the appellant, on filing the transcript, shall pay to the clerk a stated fee in advance, the transcript is not filed until the fee has been paid, notwithstanding its delivery into the possession of the officer. *Hills v. Hills*, 162.

TRANSFERRING CAUSE—SERVING NOTICE OF APPEAL.

6. Since the amendments of 1899 and 1901 relating to the manner of taking appeals to the supreme court (now embodied in B. & C. Comp. § 549, subd. 1), the notice of appeal need not be served on any adverse parties except those who have appeared. *Mendenhall's Will*, 542.

CONCLUSIVENESS OF RECORD—DISPUTE IN TESTIMONY.

7. Where there is any testimony reasonably tending to support the findings of a judge before whom a case has been tried without a jury, the sufficiency thereof will not be reviewed.
Ferguson v. Reiger, 505.

ISSUE APPEARING OF RECORD—NEED OF ALL THE TESTIMONY.

8. Where, on appeal, it appears from plaintiff's own showing in the bill of exceptions, taken in connection with the pleadings and the contract involved, that he is not entitled to recover, the ruling of the trial court on a motion for a nonsuit may be reviewed, although only part of the evidence appears in the record, for enough appears to show the basis of plaintiff's claim.

Herring-Marvin Co. v. Smith, 315.

MOTION TO AFFIRM OR DISMISS.

9. Under B. & C. Comp. § 553, requiring the appellant to file a transcript, after which the appellate court shall have jurisdiction, and not otherwise, and providing that if the transcript is not filed within the time fixed, the appeal shall be deemed abandoned, a failure to file a transcript in time may be taken advantage of by motion to dismiss the appeal, and a motion to affirm the judgment is not the exclusive remedy.

Hills v. Hills, 162.

MOTION TO DISMISS OR AFFIRM—RULES OF COURT.

10. A motion to dismiss an appeal, or to affirm the judgment because of failure to file briefs, as required by Rule 14, need not be considered where an examination of the record shows that the judgment should be affirmed on the merits.

Steiger v. Fronhofer, 178.

DISMISSAL—GROUNDS MUST BE JURISDICTIONAL.

11. Irregularities in an appeal from a county court to the circuit court may be reviewed on appeal to the supreme court, but do not afford any ground for dismissing the latter appeal, since they do not pertain to either the jurisdiction or the rules of the last-named court.

Mendenhall's Will, 542.

DISMISSAL—MISSING TESTIMONY.

12. The question whether or not certain testimony taken in the cause in the county court and lost was retaken or supplied, or the irregularity waived in that court, is immaterial on a motion to dismiss the appeal from the circuit court, it appearing from the record that all the testimony that was before the county court at its final hearing on the merits accompanies the transcript to the supreme court.

Mendenhall's Will, 542.

DISMISSAL—SPECIFICATION OF REASONS IN MOTION.

13. Where it is the duty of a court to dismiss an appeal *sua sponte* an indefinite motion to dismiss will be considered sufficient to require for action.

Heiney v. Heiney, 577.

DISMISSAL—MEANING OF "TRANSCRIPT."

14. The word "transcript," as used in Section 553, B. & C. Comp., providing that the appellant shall file a "transcript," or such an abstract as the rules of the appellate court may require, of so much of the record as may be necessary to intelligently present the questions to be decided, does not now mean a copy of the judgment roll as it did before the amendment of 1899 (Laws 1899, p. 230), but rather a fair synopsis of the proceedings in the trial court relative to the questions reserved by appellant for further consideration. The transcript must be correct as to the matters involved, and sufficiently complete not to be misleading. It need not present the record as to matters relied upon by the respondent, the latter being protected by the right to ask for an additional record, under section 554.

Backhaus v. Buells, 558.

REVIEW—PRESUMPTION AGAINST ERROR.

15. Where the transcript does not contain all the record necessary to the determination of a disputed question, it will be presumed that there was no error.

Cranor v. Albany, 144.

HARMLESS ERROR — ADMISSIONS AGAINST INTEREST.

16. Error in permitting accused to be asked on cross-examination, for purposes of impeachment, as to matters which he had not testified to in chief, was harmless error where the testimony was admissible as declarations against interest, and refuted defendant's plea of former conviction for the same offense.

State v. Deal, 17.

WAIVING OBJECTION THAT MOTION FOR NONSUIT IS DEFECTIVE.

17. Where, on appeal, the correctness of a ruling as to a nonsuit is tried out on the merits, an objection on rehearing that the motion for the nonsuit was insufficient because it did not state the specific ground on which it was based, will not be entertained, as it was waived by not being urged at the proper time.

Herring-Marvin Co. v. Smith, 315.

QUESTION NOT RAISED IN TRIAL COURT.

18. Indefiniteness not amounting to a failure to state a cause of action cannot be presented first on appeal.

Pugh v. Spicknall, 430.

DETERMINATION — WHEN JUDGMENT OF SUPREME COURT IS RENDERED.

19. A judgment of the supreme court is final when the decision is announced, or, in other words, that is the date of the "rendition" of the judgment or decree.

McFarlane v. McFarlane, 477.

DECISION IN GENERAL.

20. Under B. & C. Comp. § 556, conferring on the supreme court power to modify judgments and to order new trials, a judgment based on a verdict may be reversed and the cause remanded with directions to enter a particular judgment in case the facts are undisputed.

Graham v. Merchant, 294.

REVERSAL — DIRECTING PARTICULAR JUDGMENT.

21. Where a reversible error is one not affecting the general result, but only the particular amount of the judgment, and the corrective information is apparent on the record, the case may be reversed with directions to enter a stated judgment, rather than to hold another trial.

Graham v. Merchant, 294;

Ferguson v. Reiger, 505; *La Vie v. Crosby*, 612; *Anderson v. Adams*, 621.

MANDATE AND PROCEEDINGS IN LOWER COURT.

22. Where a final decree has been entered on the decision of a demurrer to a complaint, and such final order is affirmed, it is discretionary with the supreme court to enter a final decree or to remand the case for such further proceedings as the trial court may deem proper.

McLeod v. Lloyd, 290.

IDEM.

23. When an equity cause has been remanded to the trial court after affirmation of a decree entered upon the decision of a demurrer to a complaint, it devolves upon such lower court to determine whether the defeated party may plead further.

McLeod v. Lloyd, 290.

IDEM.

24. Where it appears in an equity suit that the disputed matters cannot be satisfactorily determined by the appellate court because of the condition of the record, as, because of the absence of parties, or because certain evidence has not been taken, the court may, at its discretion, remand the cause for further consideration by the trial court rather than enter a final decree.

McFarlane v. McFarlane, 477.

ARBITRATION AND AWARD.**NOTICE OF MEETING OF ARBITRATORS.**

A submission was made to two arbitrators, with power to choose a third. The parties appeared before the two, and made statements of their claims. The two, failing to agree, chose a third, who, without examining the work to be passed on, met with the other two. The arbitrator appointed by plaintiff withdrew without his knowledge, and the others made the award. Held, that notice to the parties of the meeting by the three was necessary to give jurisdiction, and, none having

been given, and plaintiff not having known that the arbitrator appointed by him had withdrawn, the award was void, though the parties knew the arbitrators were in session after the third was chosen. *Slater v. LaGrande Power Co.* 131.

ASSAULT AND BATTERY.

RIGHT OF SELF-DEFENSE AFTER PROVOKING QUARREL.

On a prosecution for felonious assault the evidence showed that defendant went out of his way and began to strike the prosecuting witness, calling him vile names, and drew his pistol. The latter arose, laid aside a knife with which he had been whittling, and, reaching for the weapon, followed defendant, who stepped backward and fired. *Held*, that it was not error to instruct that one cannot claim the benefit of the law of self-defense after he has intentionally put himself where he knows or believes he will have to invoke its aid; that circumstances justifying assault must be such as to render it unavoidable; and that, if defendant could have avoided any conflict, it was his duty to do so, and so render a resort to the law of self-defense unnecessary. *State v. McCunn*, 155.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

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The effect of settling a general assignment proceeding out of court is to leave the title of the assignor to the assigned property unaffected. *Overholt v. Dietz*, 194.

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Allowance of Fees For In Default Divorce Decrees Based on Publication of the Summons. See **DIVORCE**, 9.

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Depositing property in a storehouse, intending to sell it to the best advantage, but with a willingness to take the money value rather than the property, upon returning the receipt, is not a sale, and is a bailment. *State v. Humphreys*, 44.

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RENEWAL BY PART PAYMENT.

1. Under the settled law of this state (B. & C. Comp. § 25), a part payment of a note by a joint maker before the statute has run continues the obligation as to all. *Smith's Estate*, 505.

PAYMENT—INTENT OF PARTIES.

2. Where a note is sent to an agent for collection, and after maturity is paid by the agent, who was not liable thereon, the transaction will be treated, not as a payment, but as a purchase by the agent, if he intended it as such.

Sturgis v. Baker, 236.

PARTIES—EQUITABLE OWNER AS REAL PARTY.

3. In actions on promissory notes, where the plaintiff is not the payee, or his indorsee or transferee, he is still the real party in interest, within the meaning of B. & C. Comp. § 27, and may maintain an action on the note, if he can establish an equitable or beneficial ownership. *Overholt v. Dietz*, 194.

RIGHT OF SURVIVING PARTNER TO SUE AS REAL PARTY IN INTEREST.

4. Where, on the dissolution of a partnership, the outgoing partner takes from a debtor a note, in which are included debts due to each partner individually and to the firm, and after the outgoing partner's death his executrix turns the note over

to the surviving partner, the latter may maintain suit thereon as administrator of the partnership estate, though the code provides that every suit shall be prosecuted in the name of the real party in interest. *Overholt v. Dietz*, 194.

PLEADING—INDEFINITE COMPLAINT—EFFECT OF ANSWER.

5. A widow brought an action to recover on a note found among her husband's private papers, but on its face payable to another, alleging that the original payee had transferred the note, and that she was then the owner and holder thereof. The maker answered by denying any knowledge as to her ownership and as to whether the note had been indorsed or transferred to her by the original payee. *Held*, that, while the complaint was uncertain and vague, it was sufficient, after answer, to admit proof of the source and chain of plaintiff's title.

Sturgis v. Baker, 236.

PLEADING—MATERIALITY OF DENIAL OF OWNERSHIP.

6. In a suit on a note and mortgage, a denial of their indorsement and assignment to plaintiff and of his ownership thereof, is not sham, frivolous, or irrelevant, since it raises an issue on a material point, viz., the ownership of the documents.

Overholt v. Dietz, 194.

PLEADING—CONSTRUCTION OF STIPULATION.

7. An admission that a negotiable instrument was indorsed by the payee thereof to a person other than plaintiff is not an admission that the instrument was indorsed to plaintiff's predecessor in title, the names not being the same.

Sturgis v. Baker, 236.

EVIDENTIARY FACTS—CREDIBILITY OF WITNESS.

8. Entries bearing on the ownership of a note, made in the inventory of the executrix of a deceased partner and in that of the administrator of the partnership estate, and omitted from the surviving partner's schedule, drawn when he made an assignment for creditors, are evidentiary circumstances merely, and not conclusive as to the title to the note.

Overholt v. Dietz, 194.

EVIDENCE—PRESUMPTION AS TO EXECUTION—BURDEN OF PROOF.

9. The execution of a promissory note in action being denied, there is no presumption of its regular execution, and the burden of proof on that point is with the plaintiff throughout.

Sears v. Dady, 346.

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Portland, 1898, § 156, *Oregon Real Estate Co. v. Portland*, 421, 426.

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RIGHTS AND LIABILITIES OF PARTIES — LIQUIDATED DEBT.

1. Upon a breach of the condition of a chattel mortgage the mortgagee is entitled to possession of the pledged property to apply it to the satisfaction of his debt, either by legal process or in the manner provided in the mortgage, but in both cases the amount of the obligation must be fixed. *Backhaus v. Buells*, 558.

IDEM — RIGHT OF MORTGAGEE TO POSSESSION.

2. A contract of purchase and sale having contained a hypothecation of its subject-matter as security for such damages as the buyer might sustain through the seller's failure to perform his part of the contract, the buyer is not entitled to possession of the property, upon a breach by the seller, unless the amount of his damage has been in some way ascertained; and the result is the same whether the possession is claimed under Section 5638 or Section 5637 of B. & C. Comp.

Backhaus v. Buells, 558.

CHATTEL MORTGAGE FOR FUTURE ADVANCES — TACKING DEBTS.

3. The future advances ordinarily contemplated by a mortgage security are such as may be made by the mortgagee himself, and, unless particularly provided for, the latter cannot enforce the mortgage for debts due by the mortgagor to others and assigned to him.

Backhaus v. Buells, 558.

MATERIAL AND IMMATERIAL EVIDENCE.

4. Where, in an action of replevin, if plaintiff was entitled to recover, it was on the theory that a contract security in the nature of a chattel mortgage conferred such right upon a breach of the conditions thereof, and he could not have secured such possession under the executory contract of sale, evidence that the buyer had tendered to the seller certain funds under the terms of the contract was immaterial.

Backhaus v. Buells, 558.

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RUNNING OF TIME TO FILE COST BILL IN SUPREME COURT.

2. The time allowed to file a cost bill begins at the time the opinion of the court is officially announced. *McFarlane v. McFarlane*, 477.

IDEM.

3. Where the taxable costs and disbursements can be ascertained at the time a case is decided the cost bill must be filed within the time limited by statute, in default of which it may be stricken from the files. In this case the successful party could have computed the taxable charges when the judgment was rendered, and should have filed the cost bill within five days thereafter, as required by Section 588, B. & C. Comp., as amended by Laws 1903, p. 209; but not having done so, either within five days or the first day of the next term, the costs must be disallowed. *McFarlane v. McFarlane*, 477.

DAMAGES FOR DELAY.

4. Damages for delay necessitated by an appeal as authorized by B. & C. Comp. § 557, cannot be allowed where the supreme court is unable to say from the record that the appeal was not taken in good faith. *Manary v. Runyon*, 195.

ALLOWING COSTS ON CONDITIONAL AFFIRMANCE OF JUDGMENT.

5. Objection having been promptly taken to a ruling of the trial court, in a law action, whereby the opposite party might have consented to a correction of such ruling, and on appeal it appearing that this ruling constituted the only error, and that it caused an excessive judgment in an ascertainable amount, as the sum allowed as interest, or as damages, the appellant may be allowed his costs, though the judgment is ordered affirmed less the excess.

Graham v. Merchant, 294, 314; *Ferguson v. Rieger*, 505;
La Vie v. Crosby, 612; *Anderson v. Adams*, 621.

IDEM.

6. If the attention of the trial court could have been, but was not, invited to the error, thereby giving the adversary an opportunity to remit the excess, and he would not, the penalty for not doing so is the payment of the costs.

Graham v. Merchant, 291, 314; *Ferguson v. Reiger*, 505;
La Vie v. Crosby, 612; *Anderson v. Adams*, 621.

APPEAL — COSTS — BRIEFS — STIPULATION.

7. The parties in an appeal stipulated that the briefs and abstract therein might be used on appeal in another action, in which the appellee in the first mentioned appeal was appellant. In the other appeal judgment was reversed, entitling appellant therein to costs; and in the appeal for which the brief and abstract were originally prepared there was also a reversal, making the same party liable for costs on that appeal. *Held*, that the stipulation did not operate to make half the costs of printing chargeable to each appeal, but that the successful party in the first appeal was entitled to the full costs of printing.

McFarlane v. Cornelius, 513.

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COUNTIES.

CONSTITUTIONAL PROHIBITION AGAINST INDEBTEDNESS.

1. A debt incurred for the construction of a courthouse is one voluntarily incurred, within the prohibition of Const. Or. Art. XI, § 10, providing that no county shall create any debts or liabilities exceeding \$5,000, except for certain purposes. This section does not prohibit the creation of debts in the performance of some imperative public duty, but providing a courthouse is not such, for it may be postponed in the discretion of the county authorities. *Baton v. Minnaugh*, 463.

COUNTY INDEBTEDNESS—CONFLICT BETWEEN CONSTITUTION AND STATUTE.

2. A legislative direction to violate a constitutional prohibition is void. For instance, the act of the legislature directing that an election be held to select a

county seat of Union County, and, in case of the selection of another than the present place, that the county officers provide \$45,000 by an issue of warrants for the construction of a new courthouse (Laws 1903, p. 104), is void, the county being already in debt beyond the limit permitted by the state constitution.

Eaton v. Minnaugh, 465.

STATUTE — CREATION OF COUNTY INDEBTEDNESS.

3. An act requiring an election to be held for the selection of a county seat, and directing the county clerk to issue warrants to pay the cost of constructing a new courthouse, if a new location shall be selected, and to levy a tax each year for five years to pay off such warrants, does not limit the liability on such warrants to the proceeds of the levy (Laws 1903, p. 104), nor is it a legislative creation of a legal liability which must be recognized, like the expense of holding the sessions of the courts, or the payment of statutory salaries, but is a direction to the county officials to create a county debt for a purpose other than to suppress insurrection or repel invasion, within the prohibition of Const. Or. Art. XI, § 10.

Eaton v. Minnaugh, 465.

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COURTS.

ENFORCING LIABILITY INCURRED IN SISTER STATE — COMITY.

1. A right of action accrued in one state, whether statutory or otherwise, may be enforced in any court of another state having jurisdiction of the subject-matter and of the parties, the cause of action originally not being contrary to justice or morals, or against the public policy of the forum.

Bergman v. Inman, 456.

WHEN JUDGMENT OF SUPREME COURT IS RENDERED.

2. A judgment of the supreme court is final when the decision is announced, or, in other words, that is the date of the "rendition" of the judgment or decree, within the meaning of Section 588, B. & C. Comp., as amended by Laws 1903, p. 209, and the time then begins to run against the right to file a cost bill.

McFarlane v. McFarlane, 477.

Setting Aside Orders After Close of Term. See JUDGMENTS, 4.

CRIMINAL LAW.

NATURE OF CRIME — INTENT AS AN ELEMENT.

1. While it is a general rule that the state must prove a criminal intent in all cases of felony, it is not necessary to prove it by direct testimony, the jury being permitted, upon proof of the overt act, to deduce the intent from a consideration of the surrounding circumstances.

State v. Humphreys, 44.

CHANGE OF VENUE — ABUSE OF DISCRETION.

2. The right to change the venue of a trial is one confided by statute to the discretion of the trial judge, to be carefully exercised to the end that all interested parties may be justly treated; and in the present instance it does not appear that the trial judge abused the discretion reposed in him.

State v. Humphreys, 44.

IDEM.

3. The determination of an application for a change of venue is a matter for the exercise of discretion by the trial court, and its decision will not be reversed unless it appears that an injustice has resulted. In the present instance it is clear that the refusal to change the place of trial was not error.

State v. Armstrong, 207.

NEED OF PRELIMINARY EXAMINATION.

4. Section 1600 of B. & C. Comp., providing that "The defendant must in all cases be taken before the magistrate without delay," is not mandatory, but should be considered in connection with sections 1258 and 1260, providing for the filing of informations by district attorneys on or before the first day of the next regular term of the circuit court before which he is required to appear in cases where the defendant has been held to answer, and when so read it is directory only, for sec-

tion 1280 permits the district attorney to charge a person with the commission of a crime without a preliminary examination before a magistrate.

State v. Belding, 95.

INDORSEMENT OF INFORMATION BY DISTRICT ATTORNEY.

5. The district attorney alone is responsible for the filing of an information, and the fact that it is filed sufficiently indicates his conclusion as to whether an offense has been committed, without any indorsement such as is required where an indictment is returned by a grand jury.

State v. Belding, 95.

FORMER ACQUITTAL—IMMATERIAL MISSTATEMENT IN CHARGE.

6. An instruction that, if the horse for the larceny of which he was prosecuted was the same animal for the larceny of which he was formerly convicted, the conviction was a bar to the prosecution, and the verdict should be for defendant on the issue of former conviction, but, if the prosecution in this case was for a different horse, then the verdict on such issue should be for the state, is a correct and compact statement of the law; and the fact that the instruction improperly referred to the horse for the larceny of which the accused was formerly convicted as a brown horse was not reversible error where the color of the horse had no bearing on the question of identity.

State v. Deal, 17.

FACTS RELEVANT TO ISSUE—OTHER CRIMES.

7. It is reversible error to admit in a criminal case evidence that defendant had committed other crimes in no way connected with the one charged.

State v. Houghton, 125.

RES GESTÆ—SUBSEQUENT STATEMENTS.

8. A declaration by a person charged with a crime, made after his arrest and when sufficient time had elapsed to formulate a plan of defense, is not part of the *res gestæ*, since it is not so intimately connected with the principal event, either in time or character, as to explain or illustrate it.

State v. Smith, 100.

IDEM.

9. Statements made by a prosecuting witness after the assault in question had occurred, and after the witness had been removed from the scene, are not competent evidence as part of the *res gestæ*.

State v. McCann, 155.

IDEM.

10. On a prosecution for a felonious assault, statements made by the prosecuting witness afterward as to what he would have done at the time had he been armed with a gun, are not competent, since they do not tend to explain the occurrence, or to show the motives or feelings of the witness.

State v. McCann, 155.

MATERIALITY—PHOTOGRAPHS AS EVIDENCE.

11. Although photographs of persons, places, or things are sometimes admitted as evidence, they are never competent unless necessary in some matter of substance, or instructive in establishing material facts or conditions, which was not the case here where all the facts sought to be shown by the photographs could have been established by oral testimony.

State v. Miller, 325.

IDEM.

12. To be admissible as evidence even under appropriate circumstances photographs must be correct representations of the subjects or conditions intended to be thereby presented.

State v. Miller, 325.

EFFECT OF ADMISSIONS OF COMPLAINING WITNESS.

13. On a prosecution for the larceny of a horse, evidence of the admissions of the complaining witness that the horse was the property of defendant, made several days after the time defendant claimed to have obtained the horse from the witness in a trade, is inadmissible, except for impeachment after proper foundation therefor having been laid, for the witness is not in any legal sense a party to the record, and his admissions are not binding on the state.

State v. Deal, 17.

HEARSAY EVIDENCE.

14. Testimony that a prosecuting witness recognized a photograph of defendant as that of the person whom he desired to complain against is hearsay and inadmissible. *State v. Houghton*, 125.

IDEM—HARMLESS ERROR.

15. Where a witness was erroneously permitted to testify that a prosecutor recognized defendant's photograph at the police station as a photograph of the person who he claimed had committed a crime, and there was subsequent testimony tending to show that defendant's photograph was in the rogues' gallery because of his having committed other crimes, the error was not harmless.

State v. Houghton, 125.

PRELIMINARY TO TRIAL—NAMES OF WITNESSES ON INFORMATION.

16. The provision of Section 1262, B. & C. Comp., that the names of all witnesses examined on oath or affirmation by the district attorney in support of an information must be added thereto before it is filed, or the testimony of such witnesses cannot be heard, is not a requirement that the accused shall be furnished with the names of intended witnesses who were examined after the filing of the information, nor a prohibition against calling other witnesses than those whose names were added to the information.

State v. Belding, 95.

CONDUCT OF TRIAL—REMARKS BY COURT.

17. Statements made by a trial judge during an argument by counsel on a proposition of law, illustrating a hypothetical case, and accompanied by such a statement as, "I think that is the law; I do not intimate that the defendant did any of those things, that is for the jury to determine," is not an invasion of the province of the jury, or an expression of opinion as to the facts in issue, or the weight of evidence.

State v. Humphreys, 44.

APPLICABILITY OF REQUESTED INSTRUCTIONS.

18. A court may properly refuse requested instructions to a jury where they are not correct expositions of the law as applied to the theory adopted by the party presenting them, and the court does not thereby refuse to present the theory of the party desiring the instructions.

State v. Smith, 109.

MOTION FOR NEW TRIAL—IMPEACHING VERDICT BY JUROR.

19. Affidavits or statements of jurors will not be received to impeach their verdict.

State v. Smith, 109.

RECORD—ERROR MADE HARMLESS BY OTHER EVIDENCE.

20. Error in admitting detailed evidence of hearsay matters is not rendered harmless by evidence of the same matter given without objection, but in a cursory way as an incident of a greater story and without details or emphasis.

State v. Houghton, 125.

REVIEW—CROSS-EXAMINATION OF ACCUSED.

21. On trial for larceny of a horse it was error to ask the accused on cross-examination, for purposes of impeachment, questions as to his testimony at another trial for the larceny of a horse, he not having testified to anything with which the statements sought to be shown would be in any wise inconsistent.

State v. Deal, 17.

IDEM.

22. Under B. & C. Comp. § 1400, authorizing the cross-examination of one accused of crime on all facts to which he testified in chief, tending to his conviction or acquittal, where one accused of murder related the circumstances leading up to the difficulty, and to his presence on the premises of the deceased, cross-examination was permissible to show that accused had been ordered off the premises by the deceased about two months previous to the killing, and that they were not on good terms, since these matters tended to show the feelings of the parties toward each other.

State v. Miller, 325.

APPEAL—PRESUMPTION AGAINST ERROR.

23. When the transcript does not contain all the record necessary to the determination of a disputed question, it will be presumed that there was no error; for example, in the absence of the city ordinances it will be presumed, in favor of the judgment below, that there was an ordinance authorizing the court to tax against an accused person the costs of a successful liquor prosecution.

Cranor v. Albany, 144.

REVIEWING DISCRETION OF TRIAL COURT.

24. On a challenge of a juror for actual bias the determination of his competency is largely discretionary with the trial judge, reviewable for abuse.

State v. Armstrong, 207.

IDEM.

25. Where the opinions of jurors in a criminal case were based on mere hearsay statements, none of the jurors having talked with any person assuming to give the facts of his own knowledge, and the jurors asserted that their opinions formed were not such as they would be willing to act on at the present time, and that they considered themselves competent to try the case on the testimony, the denial of a challenge for actual bias was not error, though the jurors stated that it would require strong evidence to remove their opinions.

State v. Armstrong, 207.

HARMLESS ERROR—ADMISSIONS AGAINST INTEREST.

26. Error in permitting accused to be asked on cross-examination, for purposes of impeachment, as to matters which he had not testified to in chief, was harmless error where the testimony was admissible as declarations against interest, and refuted defendant's plea of former conviction for the same offense.

State v. Deal, 17.

ERROR MADE HARMLESS BY SUBSEQUENT CONDUCT.

27. Error, if any, in sustaining an objection to a question asked of a juror as to whether any prejudice existed in his mind against the defendant was rendered harmless where almost the identical question was subsequently asked, and answered in the negative, without objection.

State v. Armstrong, 207.

HARMLESS ERROR—CHANGING PLACE OF CONFINEMENT.

28. Where during defendant's incarceration for homicide before his trial threats of lynching were made, an order directing defendant's removal to another place of confinement for his protection was not an error of which he could complain.

State v. Armstrong, 207.

HARMLESS ERROR—REDUCING INSTRUCTIONS TO WRITING.

29. In Oregon the rule requiring a trial judge to reduce his charge to writing, if requested to do so, and to file it with the clerk (B. & C. Comp. § 132, subd. 6), which is generally held to be mandatory, is modified by Section 1484, B. & C. Comp., providing that the supreme court shall give judgment without regard to technical errors which do not affect the substantial rights of the parties, so that the failure of a trial judge to write out certain passages from a printed book will not require a reversal, where the extracts were read without comment, and were substantially the same as the written instructions. The failure of the judge to write down the entire charge and file it was a technical but not a material error, it being manifest that the passages read did not modify or change the written charge.

State v. Armstrong, 207.

See, also, ASSAULT, HOMICIDE, LARCENY, POLYGAMY, WAREHOUSEMEN.

CRITICISED CASES. See OREGON CASES.

CROSS COMPLAINT in Law Action. See EQUITY, 1.

CROSS-EXAMINATION

Of Accused—Testimony in Another Case. See CRIMINAL LAW, 21.

Of Witness—Example of Proper Questioning. See WITNESSES, 1, 2.

CROSSINGS.

Accidents — Duty to Station Lookout. See RAILROADS, 1.

CURATIVE ACT.

Applicability of Act Curing Void Proceedings for Public Improvements — Effect of Valid Remonstrance. See MUNIC. CORP.

DAMAGES.

PLEADING — ALLEGATIONS AND PROOFS.

1. Under the rule that whenever the damages sustained do not necessarily arise from the act complained of, they must be specifically designated, a passenger suing for injuries sustained in a railway accident may show that one of his knees was skinned, his hip bruised, that he had pains in the neck, and that his legs would draw and cramp, under allegations of having been thrown down in the car, and bruised on the leg, and of having been wrenched and sprained in the back, whereby a severe contusion of the muscles and nerves resulted.

Maynard v. Oregon Railroad Co. 63.

ALLEGATIONS AND PROOFS — RAILWAY SPINE.

2. Under a complaint by a passenger for injuries, alleging that he was violently thrown down and greatly injured, being bruised on his leg, and his back being wrenched and sprained, whereby a severe contusion of the muscles and nerves resulted, and that by reason of such injuries he became sick and unable to perform labor, and his health was greatly impaired, and he was permanently disabled, proof of traumatic neurosis, or "railway spine," as it is sometimes called, resulting from concussion, or the shock in consequence thereof, or from fright, is inadmissible.

Maynard v. Oregon Railroad Co. 63.

EVIDENCE — PREJUDICIAL ERROR.

3. In a suit by a passenger for injuries in which proof of traumatic neurosis, resulting from concussion, or consequent shock, or from fright, was inadmissible under plaintiff's complaint, plaintiff's expert witness testified that he found no injury of the spine itself, but only of the muscles outside. After detailing plaintiff's debilitated and nervous condition, and asserting that a number of things might have produced it, he was asked whether, if plaintiff had received a severe injury or sprain of the back, his condition would be the outcome, and answered that, if the sprain, or wrench, or contusion was sufficient, it would. He was then asked if there was a disease known as "railway spine," and the cause of it, and his answer showed that it might be produced by actual injury, together with fright and shock, or that it might be caused by a nervous shock and fright. He was then asked, "You say that you found him laboring under a nervous state — that is, his nervous system was shocked?" to which he answered, "His nervous system is very irritable and weakened." Another expert was asked whether a person thrown down in a wreck might receive a jar or shock that would injure his nervous system or spinal cord, but which would not at first appear to be severe, and might continue for some time before becoming manifest, and answered that he might. *Held*, that the admission of the evidence was prejudicial error, notwithstanding an instruction that damages must be limited to such as might naturally be attributable to the injuries alleged.

Maynard v. Oregon Railroad Co. 63.

DEATH.

RIGHT OF ACTION BY PARENT FOR WRONGFUL DEATH OF MINOR.

The right of action for causing the death of a minor child, conferred by Section 84, B. & C. Comp., on the parents of the deceased, is not exclusive of the right of the personal representative of a deceased minor to sue for causing the death under section 81.

Schleiger v. Northern Terminal Co. 4.

DECEDENTS' ESTATES. Same as EXECUTORS & ADMINISTRATORS.

DECLARATIONS.

Adverse Statements by Witnesses for the State—Admissibility of as Evidence not for Impeachment. See **CRIMINAL LAW**, 13.

Statements by Defendant Against Interest. See **CRIMINAL LAW**, 26.

DEEDS.**PRIORITY BETWEEN RECORDED CONVEYANCES.**

1. Under B. & C. Comp. § 5359, providing that every conveyance of real property not recorded in five days shall be void as against subsequent purchasers in good faith whose conveyance shall be first duly recorded, where neither of two conveyances is recorded within the time limited, the one first recorded takes precedence over the other. *McLeod v. Lloyd*, 260.

EVIDENCE—PRESUMPTION AS TO SEALS ON DEEDS.

2. Under B. & C. Comp. § 5333, enacting that a conveyance of an interest in land may be made by "deed, signed and sealed" by the grantor, conveyances referred to in an abstract of the title as "deeds" are presumed to have been sealed as required by statute. *McLeod v. Lloyd*, 260.

DEFINITIONS. Same as WORDS & PHRASES.**DEMURRER.**

Joint General Demurrer by Several. See **PLEADING**, 8.

Waiver of Failure to State Cause of Action. See **PLEADING**, 9, 12.

DEPOSITS IN COURT.**APPLYING FUNDS.**

Where a contract for the sale of a partner's interest was unenforceable in equity, on the ground of public policy, and the court directed payment of certain money in a bank, which had been deposited as a payment on the contract to the clerk, and thereafter directed the clerk to indorse the same on one of the notes and pay the money to the defendant, the court on appeal, would order a judgment for plaintiff for the amount so paid, with interest from the date of the decree, in order that the parties might be placed in the same position they were when the action was brought. *Horseman v. Horeman*, 88.

DIRECTING JUDGMENT.

Power of Supreme Court to Order Trial Court to Enter a Specified Judgment in a Remanded Case. See **APPEAL**, 21.

DISBURSEMENTS. Same as COSTS.**DISCRETION OF COURT.**

Changing Venue—Accomplishing Justice. See **VENUE**.

Determining Competency of Jurors. See **JURY**, 4-6.

DISJUNCTIVE CHARGES of Crime. See INDICTMENT & INFORMATION, 3.**DISMISSAL AND NONSUIT. Sufficiency of Evidence. See TRIAL, 2.****DISMISSING APPEAL. See APPEAL, 9-14.****DISPUTED FACTS.**

Findings or Verdict Based on Conflicting Testimony Will Not Be Reversed by the Appellate Court. See **APPEAL**, 7.

DIVISIBLE CONTRACTS. See CONTRACTS, 8, 9.**DIVORCE.****MISCONDUCT OF PLAINTIFF AS A DEFENSE—PLEADING.**

1. Misconduct of plaintiff amounting to a cause for divorce is a defense to a suit to dissolve the marriage relation, and it will be considered whenever it appears in evidence whether pleaded or not; this under the general rule that those who come into equity must come with clean hands. *Earle v. Earle*, 223.

KEEPING HOUSE OF PROSTITUTION.

2. The managing of a public house of prostitution is such misconduct as to require a refusal of a divorce on any ground whatever. *Earle v. Earle*, 293.

EVIDENCE OF ADULTERY.

3. The evidence in this case having shown appreciable familiarity between the defendant and a neighbor who lived at her home during her husband's absence, and it appearing that there was ample opportunity for meetings, the positive statement of the husband that on unexpectedly appearing at his home early in the morning he saw his wife in bed with the neighbor will outweigh the denials of the parties involved, and a divorce should be granted for adultery.

Hall v. Hall, 619.

PARTIES AND PROCESS — POSSIBILITY OF SUBSTITUTED SERVICE.

4. After a divorce suit has been commenced, it must be inferred that neither of the parties is a "person of the family" of the other, within the meaning of B. & C. Comp. § 55, subd. 5, providing that if the defendant be not found the summons may be delivered "to some person of the family" over a stated age, where it appears that they had lived together until the day before the filing of the complaint, that plaintiff had the custody of the minor children by the marriage, and that defendant had left this state, for these statements show that the family relationship was at least suspended. Nor can the minor children who are in plaintiff's care be considered persons of the family of the other spouse under such circumstances.

McFarlane v. Cornelius, 518.

JUDGMENT OR DECREE — COLLATERAL ATTACK.

5. Where complaint in a suit for divorce alleged some facts warranting a decree in favor of plaintiff, such decree cannot be collaterally attacked on the ground that the complaint was insufficient for want of facts. *McFarlane v. Cornelius*, 518.

FINAL ORDER BASED ON PUBLICATION.

6. Where service of the summons in a divorce suit has been made by publication, and the defendant has not appeared, no decree can be rendered that will bind the defendant personally, except that the marriage is ended.

McFarlane v. McFarlane, 477.

FEES AND COSTS.

7. In cases of divorce based on a service of the summons by publication without a personal appearance of defendant, the court cannot award costs or disbursements to the successful party.

McFarlane v. McFarlane, 477.

IDEM.

8. Nor can a subsequent award of costs be made under Section 514, B. & C. Comp. after the defendant has come within the jurisdiction and been personally cited to appear.

McFarlane v. McFarlane, 477.

ALIMONY AND ALLOWANCES.

9. Where the only service of process has been by publication and the defendant has not appeared, the court cannot award such allowances as alimony or attorney's fees to the successful party.

McFarlane v. McFarlane, 477.

STATUTORY POWER TO MODIFY DECREE AS TO ALIMONY.

10. Section 514, B. & C. Comp., providing for a modification of divorce decrees at any time so far as they affect the maintenance of either party, does not authorize the revision of such decrees by adding requirements for the payment of items like alimony or attorney's fees, where the decree was entered without an appearance by the defendant.

McFarlane v. McFarlane, 477.

CUSTODY AND SUPPORT OF CHILDREN.

11. Under Section 514, B. & C. Comp., authorizing the modification of divorce decrees at any time after their rendition, in so far as they provide for the custody, nurture, and education of minor children, courts may subsequently, on proper

notice, require parties in fault to contribute to the future support of their minor children, and to pay a reasonable sum for their past support, as the duty of the parents to care for and educate their offspring is not affected by a divorce.

McFarlane v. McFarlane, 477.

DOWER.

EFFECT OF ADMINISTRATOR'S SALE ON DOWER.

A widow's right of dower is not affected by a sale of realty to pay debts of her deceased husband.

Smith's Estate, 595.

DUPLICITY in Criminal Charges. See INDICTMENT & INFORMATION, 3, 4.

DYING DECLARATIONS as Evidence. See HOMICIDE, 9.

EARTHWORK.

Testimony as to Safe Degree of Slope. See EVIDENCE, 16.

EASEMENT.

ACCEPTANCE OF EASEMENT GRANTED BY CONGRESS FOR HIGHWAYS.

1. The continuous use of a road over unoccupied government land by the public for twenty years, during thirteen years of which the road has been located by a court proceeding, and marked by the public surveyor, amounts to an acceptance of the easement granted by the act of Congress of July 26, 1866 (Rev. Stat. U. S. § 2477) for the construction of highways over government lands not reserved for public use.

Wallowa County v. Wade, 253.

HIGHWAYS OVER PUBLIC LAND—RIGHTS OF SUBSEQUENT PURCHASER.

2. After the right to use certain government land for a public highway has become fixed, one subsequently acquiring title thereto takes subject to such easement.

Wallowa County v. Wade, 253.

HIGHWAYS BY PRESCRIPTION OVER STATE LAND.

3. Continuous use by the public as a highway of a strip of state land for more than twenty years, during the ownership of the state, establishes a public easement by prescription over such land for highway purposes.

Wallowa County v. Wade, 253.

EXHIBITS.

Effect of Attaching to Bill in Equity. See PLEADING, 3.

EJECTMENT.

JUDGMENT IN EJECTMENT AS RES JUDICATA.

A judgment in an action of ejectment dismissing the complaint and awarding costs to defendant, based on a verdict finding for the defendant and against the plaintiff, is not a bar to another ejectment action for the same land, for it does not appear by either the verdict or judgment that there was a determination of the question of title directly or inferentially.

Hoover v. King, 281.

EMBANKMENTS.

Expert Evidence as to Safe Degree of Slopes. See EVIDENCE.

EMBEZZLEMENT.

SHERIFFS—EMBEZZLEMENT OF TAXES—ROLLS AS EVIDENCE—ESTOPPEL.

1. In a prosecution against a public tax collector for embezzling taxes the rolls delivered to him by the proper officials are competent evidence to show the amounts collected, though such rolls may not have been properly certified, or have had attached the statutory warrants, for the officer is estopped by his own conduct to deny that the rolls were enforceable.

State v. Neilon, 163.

ACTS OF DEPUTIES—PRESUMPTION AS TO DISPOSAL OF TAXES.

2. Where it appears that deputy tax collectors placed their collections with the other funds of the office, it will be presumed, even in a criminal case for embezzlement, that such funds came into the hands of the principal, and in a settlement of his accounts he should be charged with such sums.

State v. Neilon, 163.

PRESUMPTION AS TO MONEY PAID FOR TAXES BY CHECK.

3. Under a statute requiring taxes to be paid in current gold and silver coin of the United States, and requiring tax collectors to give receipts for taxes so paid "as cash," it will be presumed, in the absence of a contrary showing, that the tax collector cashed drafts, checks, or money orders which he received for taxes in lieu of coin, and hence such drafts, etc., are properly chargeable to him in a prosecution for embezzling moneys collected for taxes. *State v. Neilon*, 168.

COMPETENCY OF EVIDENCE OF EMBEZZLEMENT OF TAXES.

4. Under Hill's Ann. Laws, § 2797, requiring the sheriff to settle with the county treasurer once in every thirty days, and to pay over to that officer all moneys received for taxes, and the treasurer to give the sheriff duplicate receipts for the money paid over, one of which is required to be filed with the county clerk, in a prosecution against a sheriff for embezzling taxes collected, the sheriff's statements on which he had made settlements with the county treasurer, the treasurer's books, and the duplicate receipts so filed, are competent evidence of the amount accounted for by the sheriff, and are *prima facie* sufficient for that purpose. *State v. Neilon*, 168.

NECESSARY PROOF OF EMBEZZLEMENT OF LAWFUL MONEY.

5. Under an information charging embezzlement of lawful money of the United States, it must be proved that the money stolen was of the kind named.

State v. Neilon, 168.

SUFFICIENCY OF PROOF OF EMBEZZLEMENT OF LAWFUL MONEY.

6. Where a sheriff was authorized to receive in payment of taxes only current gold and silver coin of the United States and certain county orders, and in a prosecution against him for embezzlement of money so received it was proved that he collected as taxes while in office, and paid over to the county treasurer, certain sums, leaving a balance unaccounted for, and that he and his deputies received for taxes gold, silver, and treasury notes, national bank notes, silver certificates, checks, money orders, and county warrants, the evidence sufficiently supported an allegation in the indictment that the money converted by defendant was "lawful money of the United States," though the particular coins converted were not identified, for, in such cases, it is not necessary to show the character of the money converted, since presumably public officers receive only lawful money.

State v. Neilon, 168.

CONSTRUCTION OF STATUTES RELATING TO EMBEZZLEMENT.

7. Section 1772, Hill's Ann. Laws, is a general statute for the punishment of persons who may receive public money and fail to account therefor, while section 1895 relates only to tax collectors who fail to perform certain stated duties; hence a sheriff who has been convicted of converting to his own use money received by him for taxes is punishable under section 1772.

State v. Neilon, 168.

EMINENT DOMAIN.**NATURE OF ORDER OF CONDEMNATION.**

The purpose and effect of an order of condemnation of property for a public purpose is simply to fix the amount to be paid, and no personal judgment should be given for any part of the price of the property condemned.

McCall v. Marion County, 536.

ENTIRE CONTRACT. See **CONTRACTS**, 8, 9.

EQUITY.**EFFECT OF EQUITABLE CROSS-BILL AND DECREE THEREON.**

1. Under B. & C. Comp. § 391, providing that in an action at law, where defendant is entitled to equitable relief, he may, on answering, file a complaint in equity, which shall stay the proceedings at law, and the case shall thereafter proceed as in equity, when such proceedings may be enjoined or allowed to proceed, the equity court does not obtain jurisdiction over the original action, but it remains

simply in abeyance until the equity suit is decided, when it is either enjoined or released, and as to this latter alternative, the absence of a restraining clause in the decree is practically a permission to continue the original proceeding at law.

Finney v. Egan, 1.

RESTORING PARTIES TO THEIR ORIGINAL POSITIONS.

2. In enforcing the rule that parties to contracts against public policy shall be left where equity finds them it is sometimes necessary to enter a judgment against one of the parties for the value of property received from the other during the litigation, and equity will use appropriate means and orders to restore all the parties to their original positions before dismissing them.

Horseman v. Horseman, 83.

ENFORCEMENT OF PARTLY VOID CONTRACT.

3. Equity will not undertake to aid either party to a void contract in any way, but will leave them just where they have placed themselves.

Horseman v. Horseman, 83.

FORMS OF FINAL ORDERS IN LAW AND EQUITY—PRACTICE.

4. Under the Oregon practice a suit in equity either passes to a decree or is dismissed.

Hoover v. King, 281.

Illegality of Consideration for Contract as Ground for Refusing Equitable Relief. See *CONTRACTS*, 6, 7.

See, also, *INJUNCTIONS*, *PARTITION*, *QUIETING TITLE*.

ESTATES of Decedents. Same as *EXECUTORS & ADMINISTRATORS*.

ESTOPPEL.

EMBEZZLEMENT OF TAXES—ROLLS AS CONCLUSIVE EVIDENCE.

1. In a prosecution against a public tax collector for embezzling taxes the rolls delivered to him by the proper officials are competent evidence to show the amounts collected, though such rolls may not have been properly certified, or have had attached the statutory warrants, for the officer is estopped by his own conduct to deny that the rolls were enforceable.

State v. Neilson, 106.

JUDGMENT AS AN ESTOPPEL.

2. The conclusive element in a final order that makes it available as an estoppel is its decision on the merits of the dispute, and not that it is in favor of one or another party.

Hoover v. King, 281.

ADMISSIONS IN PLEADINGS BY GUARDIANS AD LITEM.

3. An admission in a pleading must be taken as true not only on the trial of the cause in which such admission is made, but on appeal as well, whether the admission be made by a competent person or by an infant through a guardian ad litem.

Smith's Estate, 505.

See, also, *LOGS*.

EVIDENCE.

JUDICIAL NOTICE OF DATES OF LEGISLATIVE ACTS.

1. Under B. & C. Comp. § 720, subd. 3, providing that courts will take judicial notice of the "public and private official acts of the legislative, executive, and judicial departments of this state," the courts may properly consider the dates of the enactment of the various statutes relating to The Port of Portland.

State ex rel. v. Banfield, 287.

PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.

2. Under B. & C. Comp. § 788, subd. 15, creating a presumption that official duty has been regularly performed, it will be assumed that a patent referred to as having been recorded in the county deed records was executed by the government officials with all the formalities required by law: as, for example, B. & C. Comp. § 788, subd. 15, enacts that it is to be presumed that official duty has been regularly performed, and Rev. Stat. U. S. § 458 (U. S. Comp. St. 1901, p. 259), enacts

that all patents issuing from the General Land Office shall be issued in the name of the United States, signed by the President and countersigned by the Recorder of the General Land Office. *Held*, that where an abstract of title shows a patent, though it does not show it countersigned by the Recorder, it will be presumed that it was so countersigned. *McLeod v. Lloyd*, 280.

EVIDENTIARY FACTS—CREDIBILITY OF WITNESS.

3. Entries bearing on the ownership of a note, made in the inventory of the executrix of a deceased partner and in that of the administrator of the partnership estate, and omitted from the surviving partner's schedule, drawn when he made an assignment for creditors, are evidentiary circumstances merely, and not conclusive as to the title to the note. *Overholt v. Dettz*, 194.

RES GESTÆ—STATEMENTS SUBSEQUENTLY MADE.

4. A declaration made by a participant in an affair after the lapse of sufficient time to formulate an account or explanation of it, is not part of the *res gestæ*, since it is not so intimately connected with the event itself, in either time or character, as to explain or illustrate it. *State v. Smith*, 109.

IDEM.

5. Statements made by a prosecuting witness after the assault in question had occurred, and after the witness had been removed from the scene, are not competent evidence as part of the *res gestæ*. *State v. McCann*, 155.

COMPETENCY.

6. In an action for damages suffered by loss of a growing crop through failure to provide water as contracted for, it is competent to show the condition of the crop at the time when irrigation was necessary and the probable yield had the water been furnished. *Anderson v. Adams*, 621.

COMPETENCY OF PHOTOGRAPHS AS EVIDENCE.

7. Although photographs of persons, places, or things are sometimes admitted as evidence, they are never competent unless necessary in some matter of substance, or instructive in establishing material facts or conditions which was not the case here where all the facts sought to be shown by the photographs could have been established by oral testimony. *State v. Miller*, 325.

IDEM.

8. To be admissible as evidence even under appropriate circumstances photographs must be correct representations of the subjects or conditions intended to be thereby presented. *State v. Miller*, 325.

BEST AND SECONDARY EVIDENCES—RECORDS OF WEATHER BUREAU.

9. Records kept by public officers in the performance of their official duty, as, the amount of daily rainfall, or the velocity of the wind, recorded by officers of the United States Weather Bureau, are admissible in evidence to prove the facts therein stated. *Scott v. Astoria Railroad Co.* 26.

SUMMARY OF MANY ENTRIES.

10. Under the rule that a summary of many accounts or documents may be presented in lieu of the originals, where only the general result is desired as evidence (B. & C. Comp. § 703, subd. 5), an officer of the United States Weather Bureau may state the general results of the observations made at his station for a series of years, compiled from the entries made officially in the required records by the various persons who have been in charge of the station.

Scott v. Astoria Railroad Co. 26.

ADMISSIONS—PROOFS OF DEATH FURNISHED BY BENEFIT SOCIETY.

11. Adverse statements made by the officers or agents of a mutual benefit society in accordance with its rules are competent evidence as admissions against interest. *Patterson v. United Artisans*, 333.

PAROL EVIDENCE OF ACTUAL TRANSACTION.

12. The real nature of a transaction involving the indorsement and delivery of a bill of lading may be shown by parol. *Walker v. First Nat. Bank*, 102.

PAROL EVIDENCE OF TRUST IN PERSONAL PROPERTY—VARYING WRITING.

13. Parol evidence is competent to show that a transfer of personal property by a bill of sale absolute in form was in trust for the assignor. *Martin v. Martin*, 119.

PAROL EVIDENCE TO IDENTIFY PERSON MEANT BY WRITING.

14. Where a power of attorney appoints C. K. and — K., said C. K. and — K., composing the firm of K. Bros., and doing business in the name of K. Bros., as the grantor's lawful attorneys, etc., parol evidence is admissible to supply the Christian name of the person whose Christian name was left blank, it not tending to enlarge or alter the writing, but rather to identify a person referred to therein. *La Vie v. Tooe*, 590.

OPINION TESTIMONY MUST BE BASED ON THE EVIDENCE.

15. Hypothetical questions to expert witnesses must be based on facts previously testified to, of which rule this case affords an example: A passenger suing for injuries testified that the collision threw him into a corner of the car, where he struck something and fell on the floor; that he was thrown down pretty hard, and was hurt in the back, and had a sharp pain there after falling. Expert witnesses for plaintiff testified that they discovered no evidence of injury to his spine, except the inference from his nervous condition. *Held*, that a hypothetical question as to whether a person might receive, by being violently thrown down, or by any severe jar or shock in a wreck, a shock that would injure his nervous system and spinal cord, was unsupported in the evidence. *Maynard v. Oregon Railroad Co.* 63.

OPINION TESTIMONY ON SLOPES OF EARTHWORK.

16. A competent civil engineer may, though he has never been directly employed in the building of railroads, give expert testimony as to the degree of inclination which should be given the slopes of railroad cuts or embankments in different soils and climates. *Scott v. Astoria Railroad Co.* 26.

SCIENTIFIC AND PROFESSIONAL BOOKS AS EVIDENCE.

17. Books on civil engineering are not competent evidence of the degree of slope that may safely be given to an earth embankment, and they should not be read to the jury. *Scott v. Astoria Railroad Co.* 26.

USE OF SCIENTIFIC BOOKS TO SUSTAIN AN EXPERT.

18. An expert may be permitted to give the names of authors on the subject under consideration who support the opinions he has expressed. *Scott v. Astoria Railroad Co.* 26.

EXCEPTIONS

To Instructions—Sufficiency and Form Of. See APPEAL, 3.

EXECUTORS AND ADMINISTRATORS.

STATUTES OF WASHINGTON—CLAIMS—NONINTERVENTION WILL.

1. Section 6228 of Ballinger's Ann. Codes & Stat. Wash. providing that claims not presented against an estate within one year after the first publication of the notice to creditors shall be barred, does not apply to claims against an estate settled under what is known in that state as a nonintervention will. *Smith's Estate*, 595.

EFFECT OF ADMINISTRATOR'S SALE ON DOWER.

2. A widow's right of dower is not affected by a sale of realty to pay debts of her deceased husband. *Smith's Estate*, 595.

CLAIM OF A GIFT NOT A CLAIM AGAINST THE ESTATE.

3. A claim to certain property as a gift cannot be regarded as a claim against the estate of the donor, within the meaning of Section 1161, B. & C. Comp., requiring other evidence than that of the claimant to establish it. *Waite v. Grubbe*, 406.

APPLICATION FOR ORDER OF SALE — WIDOW'S INTEREST.

4. The widow is not a necessary or even a proper party to a proceeding to procure the sale of the realty of a decedent to pay debts, and her position is not affected by her being a joint maker with her deceased husband of the obligations to be paid. Not being properly in the litigation, she is in no sense an adverse party to any appeal under B. & C. Comp. § 549, subd. 1. *Smith's Estate, 595.*

ORDER FOR SALE — APPEALABLE INTEREST OF ADMINISTRATOR.

5. An administrator has an appealable interest in an order of a county court dismissing his petition for a license to sell property of the estate to pay a claim which has been allowed. *Smith's Estate, 595.*

ORDER OF SALE — ADMISSIONS BY GUARDIANS AD LITEM.

6. It being admitted in objecting to an administrator's petition for leave to sell the real property to pay claims against decedent that the only property belonging to the estate is such realty, the objectors, whether adults, or minors acting through a guardian, will not be permitted to urge on appeal an absence of proof that the personalty had been exhausted. *Smith's Estate, 595.*

ORDER OF SALE — BURDEN OF PROOF ON THE ENTIRE CASE.

7. Under the general rule that the party making an allegation has the burden of proof in reference to it, the objectors to an order for the sale of a decedent's realty, on the ground that the claimant was not a resident of this state when his claim matured, must prove their case, taking into account all admissions and all presumptions from conceded or established facts. *Smith's Estate, 595.*

LACHES IN ASKING FOR SALE OF DECEDENT'S REALTY.

8. A delay of nearly ten years in procuring letters of administration and filing a petition for license to sell real estate to pay a claim against a testator's estate, the ownership or condition of the realty not having changed, and the time for the running of the statute as to realty not having elapsed, is not such laches as to bar the right to make the sale. *Smith's Estate, 595.*

RIGHT OF EXECUTOR TO SUE INDIVIDUALLY.

9. Where a cause of action accrues to an executor or administrator after the death of the decedent, he may sue thereon either in his representative or his individual character, and, if the complaint states a cause of action in one or the other it is sufficient. *Sears v. Daly, 346.*

SETTLEMENT — FILING PROOF OF PUBLICATION OF NOTICE.

10. The requirement of Section 1159 of B. & C. Comp., that a copy of the published notice to the creditors of an estate shall be filed within six months from the date of such notice, is directory only, and the failure to file the notice will not affect the validity of the final decree, if the notice was in fact published. *Conant's Estate, 590.*

OPENING FINAL SETTLEMENT FOR FRAUD.

11. The testimony herein does not justify the vacation of the decree of final settlement on the ground of fraud. *Conant's Estate, 590.*

EXPERT EVIDENCE.

Statements by Theoretical Expert — Competency of Scientific Books to Support his Views. See EVIDENCE, 16, 17.

Slopes of Earthwork that May be Safely Made. See EVIDENCE, 16.

Hypothetical Questions Must be Based on Evidence. See EVIDENCE, 15.

FEES. Payment of as an Element of Filing Papers. See RECORDS, 1, 2.

FILING

Paper Without Paying Preliminary Fee. See RECORDS, 1.

Paper — Effect of Delivery to Officer. See RECORDS, 2.

Proof of Publication of Summons. See PROCESS, 5.

Proof of Publication of Notice to Creditors. See EX'RS. & ADM'RS, 10.

Undertaking After Taking Appeal. See JUSTICES OF THE PEACE, 4.

FINAL ORDER Which May be Appealed From. See **APPEAL**, 1.

FINDINGS

Cure Defects in a Complaint not Vital. See **PLEADING**, 11.

Conclusiveness of on Appeal. See **APPEAL**, 7.

FORCIBLE ENTRY AND DETAINER.

NEED OF ALLEGING OWNERSHIP.

In view of the provisions of Section 5747 of B. & C. Comp., that it will be sufficient, in actions for forcible entry and detainer, to describe with convenient certainty the property involved, to state that the defendant is in possession and unlawfully holds the same with force, and that plaintiff is entitled to the possession, it is unnecessary to allege the ownership. *Heiney v. Heiney*, 577.

Appeal to Circuit Court—Undertaking. See **JUSTICES OF THE PEACE**, 3, 4.

Ousting Jurisdiction of Justice's Court. See **JUSTICES OF THE PEACE**, 1.

FORECLOSURE. Mortgage Securing Outlawed Note. See **MORTGAGES**, 1.

FORMER ADJUDICATION. See **JUDGMENTS**, 6, 8.

FOUNDATION FOR IMPEACHMENT. See **WITNESSES**, 5, 6.

FRAUD

As a Necessary Element in a Suit to Remove a Cloud From the Title to Realty.

See **QUIETING TITLE**, 5.

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS**.

FRAUDULENT CONVEYANCES.

SUIT TO REMOVE CLOUD—BURDEN OF PROOF.

In cases to remove a cloud from title where it is claimed that one of the parties holds under fraudulent deeds, the burden of proof is on the party claiming the fraud to both allege and prove it, even though his title is based on deeds that are *prima facie* voluntary. *McLeod v. Lloyd*, 280.

FRIVOLOUS Denial. See **BILLS & NOTES**, 6.

GARNISHMENT.

GARNISHEE'S CONTRACT TO HOLD GARNISHED PROPERTY.

1. A receipt acknowledging that receiptors, who were garnishees in an action against A, had "received from C, sheriff all the hops raised by A on our land," is an admission that the sheriff had possession of the hops in his official capacity, and that A owned them. *Colbath v. Hoefer*, 366.

PLEADING—BREACH OF CONTRACT TO RETURN ATTACHED PROPERTY.

2. Where a receipt given to a sheriff by garnishees acknowledged the receipt of property of the judgment debtor, which receiptors agreed to hold until ordered "to release the same" by the sheriff, an allegation in the complaint in an action by the sheriff for breach of the contract to return the property, that plaintiff had demanded possession of the property, which receiptors refused and still refuse to deliver, was sufficient, after answer, as an allegation of breach of the agreement to return the property. *Colbath v. Hoefer*, 366.

ESTOPPED BY CONDUCT.

3. Where a receipt given by garnishees acknowledged that receiptors had received certain property of the judgment debtor from the sheriff, which they agreed to hold until released by the sheriff, they were estopped, in an action by the sheriff for breach of the agreement to return the property, from showing that the property had never been in their possession, or that the sheriff had never levied on the property or taken possession thereof. *Colbath v. Hoefer*, 366.

GIFT.**EVIDENCE OF INTENTION OF DONOR.**

1. Declarations by a father to his daughter, "I give this money to you. It is yours," etc., show unmistakably a present intent to give the money to the daughter; and the fact that in the same connection he also said, "If I should get well, and want some of it, would you let me have it?" and she replied, "Yes, papa, if you get well, you can have all of it," only emphasizes the purpose to give presently.

Waite v. Grubbe, 406.

EVIDENCE OF DELIVERY BY FATHER TO CHILD.

2. Decedent having buried sums of money in various places about his estate, took his daughter to the whereabouts of the money during his last illness, and while quite feeble, and told her definitely the several places where it was concealed, with a positive declaration that he gave it to her, cautioning her not to let any one else know where it was, and advising her to leave it there until the place was rented or she needed it. *Held*, a sufficient delivery.

Waite v. Grubbe, 406.

CLAIM AGAINST DECEDENT'S ESTATE.

3. A claim to certain property as a gift cannot be regarded as a claim against the estate of the donor, within the meaning of Section 1161, B. & C. Comp., requiring other evidence than that of the claimant to establish it.

Waite v. Grubbe, 406.

GOVERNMENT LANDS. Same as **PUBLIC LANDS**.

GOVERNMENT RECORDS as EVIDENCE.

Records of Weather Bureau—Summary. See **EVIDENCE**, 9.

GRADE CROSSING.

Care Required of Railroads—Lookouts. See **RAILROADS**, 1.

GUARDIAN AD LITEM.

Effect of Admission by in Pleading. See **ESTOPPEL**, 3.

HARMLESS ERROR

In Civil Actions. See **APPEAL**, 16.

In Criminal Actions. See **CRIMINAL LAW**, 26, 29.

HEARSAY EVIDENCE. See **CRIMINAL LAW**, 14, 15.

HIGHWAYS.**ESTABLISHMENT OF EASEMENT BY PRESCRIPTION.**

1. The continuous use of a road over unoccupied government land by the public for twenty years, during thirteen years of which the road has been located by a court proceeding, and marked by the public surveyor, amounts to an acceptance of the easement granted by the act of Congress of July 26, 1866 (Rev. Stat. U. S. § 2477), for the construction of highways over government lands not reserved for public use.

Walloua County v. Wade, 253.

IDEM.

2. Continuous use by the public as a highway of a strip of state land for more than twenty years, during the ownership of the state, establishes a public easement by prescription over such land for highway purposes.

Walloua County v. Wade, 253.

STATUTORY PROCEEDINGS.

3. An appeal to the circuit court from an assessment of damages in a proceeding brought to establish a public highway, taken under Section 4789, B. & C. Comp., brings up only the question of damages, and does not involve the regularity of any other matter.

McCall v. Marton County, 536.

METHOD OF TRYING HIGHWAY PROCEEDING ON APPEAL.

4. Where a statute provides only for an appeal from the decision of the county court in awarding damages in proceedings for the establishment of a highway, like Section 4789, B. & C. Comp., such appeal is tried as an action at law, the appel-

lant being considered as the plaintiff and the county as the defendant, just as would have been the case had the landowner brought an original action in the circuit court for damages for the location of the road.

McCall v. Marion County, 536.

APPEAL TO CIRCUIT COURT—REMANDING TO COUNTY COURT.

5. Where an appeal is taken to the circuit court from an order of damages in highway establishment proceedings, such court has no jurisdiction, after trial, to remand the case to the county court for judgment, but is itself required to render such judgment as the parties are entitled to.

McCall v. Marion County, 536.

RIGHT OF APPEAL NOT DEPENDENT ON ESTABLISHMENT OF THE ROAD.

6. The right of appeal in highway opening proceedings given by B. & C. Comp. § 4780, is not dependent on the order of the county court directing the road to be opened or established as authorized by section 4783, but is dependent upon the giving of the judgment for damages.

McCall v. Marion County, 536.

ALLOWANCE OF COSTS ON APPEAL IN HIGHWAY PROCEEDING.

7. In view of Section 576, B. & C. Comp., providing that, in all actions prosecuted or defended in the name or for the use of any county, the latter shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons, and section 4780 authorizing an appeal by a landowner from an assessment of damages in highway opening proceedings, and declaring that, if he fails to recover a more favorable judgment on appeal than the report appealed from, he shall pay all costs of the appeal, and considering that the trial on such an appeal is substantially a law proceeding, the costs and disbursements should correspondingly abide the result.

McCall v. Marion County, 536.

CONDEMNATION FOR PUBLIC ROAD—FORM OF JUDGMENT.

8. The purpose of a judgment in condemnation proceedings, as, for a public road, is to judicially fix the amount to be paid for the taking of the required property, and no personal judgment should be entered, so far as the award is concerned.

McCall v. Marion County, 536.

VACATING—NECESSITY OF PETITION.

9. Section 912, B. & C. Comp., authorizing county courts to vacate county roads in the manner provided by law, must be considered in connection with section 4783, providing the manner of publishing the petition for vacating the road, and the conclusion then necessarily follows that an application to vacate must be by petition.

Fisher v. Union County, 228.

VACATING—VARIANCE BETWEEN PETITION AND NOTICE.

10. In view of Section 4783, B. & C. Comp., requiring that notice be given of the hearing of the application for vacating a county road, a variance between the petition and the notice in stating the township in which the road to be vacated ends is fatal to the jurisdiction of the county court.

Fisher v. Union County, 228.

VACATING—WHO MAY ASK FOR WRIT OF REVIEW.

11. Under B. & C. Comp. § 595, which authorizes any party to a proceeding before an inferior court to have its decision reviewed, a person stated to be a resident in the vicinity of a certain road and to have been a remonstrator against a change in the location thereof is a party to the proceeding, and may petition for the issuance of a writ of review.

Fisher v. Union County, 228.

VACATING—COUNTY AS PARTY TO WRIT OF REVIEW.

12. The county being the ultimate responsible party in all road matters, is the proper party defendant in a proceeding to review the action of its county court in laying out, altering or vacating a highway.

Fisher v. Union County, 228.

VACATING—TO WHOM WRIT OF REVIEW IS DIRECTED.

13. Under B. & C. Comp. § 599, providing that a writ of review shall be directed to the court, officer or tribunal whose decision or determination is sought to be

reviewed, or to the clerk or other person having custody of its records or proceedings, a writ to review the action of the county court in vacating a road is properly directed to the county clerk, whose duty it is, under B. & C. Comp. § 1008, to keep the records, files, and other books and papers appertaining to said court.

Fisher v. Union County, 223.

VACATING—SPECIFYING ERRORS IN PETITION FOR WRIT.

14. Under Section 596, B. & C. Comp., providing that a petition for a writ of review must describe with sufficient certainty the decision of the inferior court and the errors alleged to have been committed therein, a petition for a review of the action of a county court in vacating a road, alleging that the road described in the notice of application for vacation posted in the courthouse was not the same road specified in the petition for vacation, is a sufficient averment of fact to support the deduction that the county court erred in not dismissing the proceedings to vacate the road for want of jurisdiction, and hence is sufficient.

Fisher v. Union County, 223.

HIGHWAYS OVER PUBLIC LAND—RIGHTS OF SUBSEQUENT PURCHASER.

15. After the right to use certain government land for a public highway has become fixed, one subsequently acquiring title thereto takes subject to such easement.

Wallowen County v. Wade, 253.

HOMESTEAD.

Agreement Before Patent to Convey is Void. See PUBLIC LANDS, 1.

HOMICIDE.

SELF-DEFENSE—THREATS NOT SUFFICIENT.

1. The right of self-defense justifying a homicide rests on the necessity of protection from a reasonably apprehended imminent danger, and must be based on some overt act of hostility, mere threats not being sufficient. *State v. Smith, 109.*

SELF-DEFENSE—DANGER MUST BE IMMINENT.

2. An apprehended bodily danger that will justify a resort to force, and an assertion of the right of self-defense, must be imminent, or apparently likely to at once be experienced. *State v. Smith, 109.*

IDEM.

3. To find a person guiltless of homicide in any degree on the ground of self-defense, the jury must find, not only that accused acted under fear of imminent death or great bodily harm, but that there was actually reasonable ground for such fear on his part. *State v. Smith, 109.*

IDEM.

4. A homicide cannot be justified on the ground of self-defense unless it is made to appear that accused had been put in imminent danger by another, and that the killing was done to prevent the apparent commission of a felony by that other on accused. *State v. Smith, 109.*

SELF-DEFENSE—RELIANCE ON APPEARANCES.

5. The right of self-defense being founded on necessity, the party who would invoke it must avoid the attack, if he can do so without danger to himself; but where an assault is precipitated without provocation, and is such as to indicate to a reasonable mind acting on appearances that the danger to life or the infliction of great bodily harm is imminent, the party assailed is justified in killing the aggressor, if necessary, and need not retreat or resort to expedients less violent.

State v. Gibson, 184.

IDEM.

6. Though in fact there is no actual necessity for taking life, yet the right of self-defense may be exercised if the person assailed has reasonable ground to believe, and in good faith actually does believe, from the surrounding conditions that death or the infliction of great bodily harm is imminent.

State v. Miller, 325.

SELF-DEFENSE — REPELLING UNARMED ATTACK.

7. In repelling an unprovoked attack the party assailed may act upon the reasonable appearances of the situation, though the assailant may not have been armed. Sometimes an unarmed attack may justify a killing in self-defense.

State v. Gray, 446.

PRESUMPTION OF INTENT TO MURDER — BURDEN OF PROOF.

8. The statute declaring that an intent to murder is conclusively presumed from the deliberate use of a deadly weapon causing death within a year is applicable only to cases where no circumstances of mitigation, justification, or excuse appear in evidence; while, where such circumstances do appear, the presumption is a rebuttable one, and the question of the intent to murder is for the jury, to be determined from a consideration of all the circumstances shown in evidence, the burden of proof remaining with the state throughout the proceeding.

State v. Gibson, 184.

CRIMINAL LAW — ADMISSIBILITY OF DYING DECLARATIONS.

9. It is not necessary that an injured person have expressed a belief in the near presence of death to render his statements competent as dying declarations, as his condition of mind may be quite apparent from his conduct. For instance, where a person who had been shot in an altercation was aware that his injuries were very severe, and had been informed by the attending surgeon that he necessarily had to die of his wounds, and that a statement by him would probably be serviceable in clearing up the matter, a corrected and signed written statement is competent evidence as a dying declaration, though the signer did not orally express his belief in impending death.

State v. Gray, 446.

NECESSITY OF AVOIDING CONFLICT.

10. One cannot claim the benefit of the law of self-defense after he has intentionally put himself where he knows or believes he will have to invoke its aid; and circumstances justifying assault must be such as to render it unavoidable. If defendant could have avoided any conflict, it was his duty to do so, and so renders a resort to the law of self-defense unnecessary.

State v. McCann, 155.

HOPS.

Replevin for Unsegregated Part of a Crop. See **REFLEVIN**, 1, 2.

Right of Possession of Part of Crop Under Chattel Mortgage for Undetermined Debt. See **CHATTEL MORTGAGES**, 1, 2.

HOUSE OF ILL-FAME.

Keeping of Is Such Misconduct by Plaintiff as to Require a Refusal of a Divorce for any Reason Whatever. See **DIVORCE**, 1, 2.

HUSBAND AND WIFE.**VALIDITY OF CONTRACTS RELATING TO DOWER AND CURTESY.**

A contract between a husband and his wife providing for the mutual execution of papers so that certain land owned in fee by him should become "exclusively" his, and land owned in fee by her should become "exclusively" hers, is one in relation to dower and curtesy, and is void under B. & C. Comp. § 5234, providing that, when property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them. *Potter v. Potter*, 149.

IMPEACHMENT. See **WITNESSES**, 5-8.

IMPLIED REPEAL by Subsequent Act. See **STATUTES**, 3.

INDEMNITY.**COMPETENCY OF EVIDENCE.**

1. In an action to recover on an agreement to indemnify plaintiff for expenses and attorney's fees if a certain contract should not be consummated, a letter written by defendant, advising plaintiff that the contract could not be entered into, and asking him to send his bill of costs, upon which defendant would send a check for the same, is admissible.

Manary v. Runyon, 486.

IDEM.

2. In such an action evidence of the amount of land and the quantity of timber involved in the proposed contract is relevant. *Manary v. Runyon*, 495.

INDICTMENT AND INFORMATION.**RULES OF CONSTRUCTION—SURPLUSAGE.**

1. Allegations not necessary to a complete description of the offense intended to be charged may be rejected as surplusage, but every essential descriptive term must be used. *State v. Humphreys*, 44.

CONVICTION OF ONE OF SEVERAL DEGREES.

2. Even if an information does charge several offenses, a conviction of any one of them should be sustained, if they are all of the same class and differ only in degree. *State v. Humphreys*, 44.

RULES OF CONSTRUCTION—CONJUNCTIVELY CHARGING SEVERAL ACTS.

3. When several acts are enumerated alternatively, the doing of each one being prohibited under a penalty, the charge may be conjunctive as to their commission, when not repugnant to each other.

State v. Humphreys, 44; *Oranor v. Albany*, 144.

INFORMATION FOR POLYGAMY—DUPLICITY.

4. An information for polygamy, under B. & C. Comp. § 1918, charging that the accused, having a wife, feloniously married another woman in Illinois, and thereafter feloniously cohabited with her in Oregon, does not charge two crimes,—the second marriage and cohabitation,—for a marriage in another state would not be an offense against the laws of Oregon. *State v. Durphy*, 79.

FILING AND FORMAL REQUISITES.

5. It is not necessary that an information be endorsed as in the case of an indictment by a grand jury—its filing is sufficient. *State v. Belding*, 95.

EXAMPLE OF SUFFICIENT ENDORSEMENT.

6. An information filed by a district attorney indorsed "A true information," followed by the printed words "Geo. E. Chamberlain, District Attorney," is sufficiently indorsed, for by filing it the printed signature was adopted by the district attorney as his own. *State v. Belding*, 95.

INFANTS.

Admissions in Pleadings by Guardians of. See **ESTOPPEL** 3.

INFERENCES.

Deducing Intent From Circumstances. See **CRIMINAL LAW**, 1.

INFORMATION. Same as **INDICTMENT & INFORMATION**.

INJUNCTION.**TRESPASS—NECESSITY OF IRREPARABLE INJURY.**

1. Equity will not enjoin the continuance of a trespass on realty unless the acts committed amount to an irreparable injury to the estate. *Moore v. Halliday*, 243.

IDEM.

2. Opening an inclosure and cutting crops and shrubbery growing thereon, and turning cattle therein, under a claim of right so to do, is not a destruction of the body of the estate, and an injunction will not lie against the trespasser. *Moore v. Halliday*, 243.

INSOLVENCY OF TRESPASSER.

3. The mere insolvency of a trespasser does not warrant an injunction against his trespassing. *Moore v. Halliday*, 243.

INCOMPLETE TITLE TO PUBLIC LAND—POSSESSION.

4. A qualified settler on public land, who is in possession, but whose title is yet uncompleted, cannot maintain a suit to quiet title thereto. *Moore v. Halliday*, 243.

See, also, **WASTE**.

IN PERSONAM.

Quality of Decrees Based on Publication. See JUDGMENTS, 1.
 Judgment of Foreclosure on Outlawed Note. See LIMITATIONS, 3.

IN REM.

Decrees or Judgments Not Based on Personal Service. See JUDGMENTS, 1.

INSTRUCTIONS

Must be Based on All the Evidence. See TRIAL, 10.
 Must be Viewed as an Entire Document. See TRIAL, 4.
 Must be Correct Law as Applied to the Facts. See TRIAL, 6, 7, 11.
 Conflicting Statements of Law are Error. See TRIAL, 5.
 Exceptions to—Form and Sufficiency of. See TRIAL, 3.
 Should be Limited to Relevant Issues. See TRIAL, 6, 9, 11.

INTENT.

Criminal Mind as an Element of Felony. See CRIMINAL LAW, 1.

INTEREST.

WHEN INTEREST BEGINS ON MONEY HAD AND RECEIVED.

1. Under B. & C. Comp. § 4505, providing for interest on money received to the use of another, and retained beyond a reasonable time without the owner's consent, interest begins to run upon money had and received from the time it is received, and not from the time of demand therefor. *Graham v. Merchant*, 294.

EFFECT OF CHANGING RATE OF INTEREST ON IMPLIED CONTRACT.

2. In an action for money had and received, where it appears that the statutory rate of interest has been changed after the money was received and before the judgment, interest should be computed to the date of the change at the rate in force when the transaction took place, and thereafter at the new rate to the date of the judgment. *Graham v. Merchant*, 294.

JUSTICE'S COURTS—INTEREST ON CLAIM BEFORE JUDGMENT.

3. Under B. & C. Comp. § 926, limiting the jurisdiction of justice's courts to actions for the recovery of money or damages where the amount claimed does not exceed \$250, a justice's court has no jurisdiction to give interest antedating the judgment when the amount awarded is \$250. *Ferguson v. Reiger*, 505.

Interest on Judgments. See JUDGMENTS, 9.

Interest on Trust Funds. See TRUSTS, 2.

Interest as Damages in Replevin. See REPLEVIN, 5.

INTERLOCUTORY DECREE.

What is Final Decree, and What is Not, in Partition. See PARTITION, 1.

INTER VIVOS. See GIFTS.

INTOXICATING LIQUORS.

REGULATING SALES—STATUTES.

1. A municipal power to "regulate, restrain and prohibit" the sale of liquors, provided that each applicant for a license shall present a bond of a certain amount and with certain conditions, is not limited by the terms of the proviso, except as to the conditions under which a license may be granted,—in other words, the power conferred may be exercised otherwise than by licensing. *Cranor v. Albany*, 144.

MUNICIPAL CONTROL OVER SALES ON SUNDAY.

2. A municipal power to "regulate, restrain and prohibit" the sale of liquors necessarily includes the power to make and enforce any reasonable rules in reference thereto, of which an inhibition of Sunday sales is an instance. *Cranor v. Albany*, 144.

CRIMINAL PROSECUTION—SUFFICIENCY OF INFORMATION.

3. Where a city ordinance makes it an offense to "sell, give away, or in any manner dispose of" intoxicating liquors on Sunday, an information charging that accused did on a Sunday, "sell, give away and dispose of" liquor is not defective as charging more than one crime.

Cranor v. Albany, 144.

JUDGMENT.

DEFAULT DECREE ON PUBLICATION—PERSONAL LIABILITY.

1. In a default decree based on a publication of the summons no personal relief can be granted, that is, the relief must be limited to the property before the court, though in divorce cases the marriage relation may be entirely dissolved.

McFarlane v. McFarlane, 477.

FORECLOSURE—LIMITATIONS—PERSONAL DECREE.

2. Where the statute of limitations has run against a note secured by a mortgage, there cannot be a personal judgment, though there may be a foreclosure of the lien for the amount due on the note.

Overholt v. Dietz, 194.

FORMS OF FINAL ORDERS IN LAW AND EQUITY—PRACTICE.

3. Under the Oregon practice a law action is disposed of by a judgment for plaintiff or defendant, or one of nonsuit, while a suit in equity either passes to a decree or is dismissed; but a judgment of dismissal is unknown at law.

Hoover v. King, 281.

VACATING DECREE AFTER CLOSE OF TERM—JURISDICTION.

4. A final order entered by a court having jurisdiction cannot be vacated after the close of the term at which it was entered; though an order entered without jurisdiction may be set aside at any time.

Conant's Estate, 590.

COLLATERAL ATTACK.

5. Where it appears by the record that a complaint contained some allegations that might have justified a decree, the final order entered thereon by default cannot be collaterally attacked on the ground that the complaint did not state a cause of suit, for by entering its decree the court must have determined that the complaint was sufficient.

McFarlane v. Cornettus, 518.

CAUSES OF ACTION BARRED.

6. A judgment in an action of ejectment dismissing the complaint and awarding costs to defendant, based on a verdict finding for the defendant and against the plaintiff, is not a bar to another ejectment action for the same land, for it does not appear by either the verdict or judgment that there was a determination of the question of title directly or inferentially.

Hoover v. King, 281.

INFERENCE AS TO AMBIGUOUS JUDGMENT.

7. When a case presents more than one issue on which the judgment may rest, one of which goes to the merits, while the others do not, it will be inferred that the judgment was not based on the merits, unless it so appears.

Hoover v. King, 281.

CONCLUSIVENESS OF ADJUDICATION.

8. The conclusive element in a final order that makes it available as an estoppel is its decision on the merits of the dispute, and not that it is in favor of one or another party.

Hoover v. King, 281.

JUDGMENTS AS AFFECTED BY THE PRAYER OF THE COMPLAINT.

9. In law actions the prayer of the complaint limits the amount of the judgment (B. & C. Comp. § 67), except that by the statute interest is added from the date of its rendition; therefore, a court ought not to award interest antedating the judgment when it is not asked.

Ferguson v. Reiger, 506.

Quality of a Final Order in a Divorce Suit Based on a Publication of the Summons. See DIVORCE, 6.

Nature of Final Order of Condemnation. See EMINENT DOMAIN.

JUDICIAL NOTICE of Dates of Statutes. See EVIDENCE, 1.

JUDICIAL POWER to Set Aside Judgments After the Term. See JUDGMENTS, 4.

JURISDICTION

To Vacate Orders After Close of Term. See JUDGMENTS, 4.

Ousting Jurisdiction — Forcible Detainer. See JUSTICES OF THE PEACE, 1.

JURY.

AFFIDAVITS OF JURORS TO IMPEACH VERDICTS.

1. Statements of jurors will not be received in either civil or criminal cases to impeach their verdict. *State v. Smith*, 109.

CONSTITUTIONAL RIGHT TO A JURY TRIAL.

2. The right of trial before a jury secured by constitutional provisions is the right as it existed when such provisions were adopted, and does not include minor offences before justices and police magistrates, such as violations of city ordinances regulating the sales of liquors. *Craynor v. Albany*, 144.

IDEM.

3. Section 516, B. & C. Comp., giving to any person claiming an interest in realty not in the possession of another a right to sue in equity to determine the respective claims, does not violate Const. Or. Art. I, § 17, preserving the right of trial by jury in civil cases, for this is only the right as it existed at common law, which applied solely to cases where the defendant had possession. *McLeod v. Lloyd*, 260.

COMPETENCY OF JUROR — DISCRETION.

4. On a challenge of a juror for actual bias the determination of his competency is largely discretionary with the trial judge, reviewable for abuse.

State v. Armstrong, 207.

COMPETENCY OF JUROR — PRECONCEIVED OPINION — BIAS.

5. Where the opinions of jurors were based on mere hearsay statements, none of them having talked with any person assuming to give the facts of his own knowledge, and the jurors asserted that their opinions formed were not such as they would be willing to act on at the present time, and that they considered themselves competent to try the case on the testimony, the denial of a challenge for actual bias was not error, though they stated that it would require strong evidence to remove their opinions. *State v. Armstrong*, 207.

HARMLESS ERROR IN EXAMINING JUROR.

6. Error, if any, in sustaining an objection to a question asked of a juror as to whether any prejudice existed in his mind was rendered harmless where almost the identical question was subsequently asked without objection, and answered in the negative. *State v. Armstrong*, 207.

JUSTICES OF THE PEACE.

JURISDICTION — TITLE TO REAL PROPERTY.

1. A justice's court is not ousted of jurisdiction in an action of forcible detainer because the complaint alleges and the answer admits the ownership of the land, as the title is not in any way thereby disputed. *Heiney v. Heiney*, 577.

AMOUNT IN CONTROVERSY — INTEREST ANTEDATING JUDGMENT.

2. Under B. & C. Comp. § 926, limiting the jurisdiction of justice's courts to actions for the recovery of money or damages where the amount claimed does not exceed \$250, a justice's court has no jurisdiction to give interest antedating the judgment when the amount awarded is \$250. *Ferguson v. Reiger*, 506.

APPEAL — FORCIBLE DETAINER — SPECIAL UNDERTAKING.

3. Where there is a right of appeal from a judgment of a justice's court in an action for the restitution of real property, the appeal is not perfected until the special undertaking for twice the rental value of the property has been given, as provided by Section 5754, B. & C. Comp., and if such an undertaking is not given within the time limited, the appeal must be dismissed. *Heiney v. Heiney*, 577.

APPEAL—FORCIBLE DETAINER—AMENDING UNDERTAKING.

4. The privilege of amending undertakings on appeal, given by Section 2249, B. & C. Comp., is not available where a required bond has not been given, as, for example, in the case of an appeal from a judgment awarding the possession of real property, for in such a case there is nothing to amend. *Heitney v. Heitney*, 577.

JUDGMENT IS LIMITED BY THE PRAYER.

5. In law actions the prayer of the complaint limits the amount of the judgment (B. & C. Comp. § 87), except that by the statute interest is added from the date of its rendition; therefore, a court ought not to award interest antedating the judgment when it is not asked. *Ferguson v. Reiger*, 505.

LACHES

In Asking for Sale or Decedent's Property. See EXECUTORS, 8.

LARCENY.

CONJUNCTIVE CHARGE OF VIOLATING A DISJUNCTIVE STATUTE.

1. Hill's Ann. Laws, § 1771 (B. & C. Comp. § 1806), provides that any person being a bailee, who embezzles or converts to his own use, or fails, neglects or refuses to deliver, keep, or account for, property placed in his care according to his trust, shall be guilty of larceny. Section 1273 (B. & C. Comp. § 1308), requires that indictments must charge but one offense, and in one form only. *Held*, that an information alleging that defendant, being a bailee of wheat for hire "did * * fail, neglect and refuse to keep or account for said wheat according to the nature of his trust," by stealing, embezzling and converting the same to his own use, does not charge more than one crime by the use of the word "or", for the quoted words (which include the "or") may be omitted without impairing the charge of larceny; and the remainder of the information charges defendant with "taking, stealing and carrying away, and embezzling and converting said wheat," which is a permissible form of charging a violation of a statute disjunctively worded.

State v. Humphreys, 44.

LARCENY BY WAREHOUSEMAN—ALLEGING PAYMENT OF CHARGES.

2. An information against a warehouseman for larceny by stealing and converting property deposited with him need not allege a payment or tender of the storage charges, for the gist of the offense is not a failure to return the deposited property on demand, but an unlawful conversion. *State v. Humphreys*, 44.

CONVERSION BY WAREHOUSEMAN—STATUTES.

3. A warehouseman who has converted property stored with him may be charged under Section 1806, B. & C. Comp. (Section 1771, Hill's Ann. Laws), defining larceny by bailee, rather than under the warehouse act, and in such a case the fact that the receipts issued for the stored property were not in the form prescribed by such act (B. & C. Comp. § 4602) is not a defense.

State v. Humphreys, 44.

LAWS OF OREGON.

For Compiled Laws, see STATUTES OF OREGON.

For Uncompiled Laws, see SESSION LAWS.

LEASE of Chattels.

Construction of "Rent" Contract. See SALES, 9.

LEGISLATIVE POWER

To Divest Title by Statutory Enactment. See TAXATION, 4.

LIENS. See MECHANICS' LIENS.

LIMITATION OF ACTIONS.

COMPUTATION OF PERIOD—ACCRUAL OF RIGHT.

1. Rights of action must of necessity accrue when and where the acts creating the right occur, and particularly is this true of rights created by statute, which of

course have no extraterritorial effect. For instance: A right of action created by a statute of the State of Washington accrues when the occurrence giving rise to it takes place in that state, and not when a similar occurrence takes place in another state, for the latter event naturally does not violate any law of Washington, since it does not happen there. *Bergman v. Inman*, 456.

EFFECT OF PART PAYMENT BY JOINT MAKER.

2. Under B. & C. Comp. § 25, providing that if any payment shall be made on a contract after it has become due, the limitation shall commence from such payment, a payment by one joint maker of a note before limitation has expired will continue the liability as to all. *Smith's Estate*, 505.

EFFECT OF BAR — PERSONAL DECREE ON FORECLOSURE.

3. Where the statute of limitations has run against a note secured by a mortgage, there cannot be a personal judgment, though there may be a foreclosure of the lien for the amount due on the note. *Overholt v. Dietz*, 194.

LIS PENDENS.

RIGHTS OF PURCHASERS PENDENTE LITE — JUDGMENT OF SISTER STATE.

Purchasers of real or personal property pending litigation over the title thereto, or the existence of a lien thereon, take subject to such final order as may be entered concerning it. As an illustration: During the pendency of a suit in a sister state to enforce a lien claimed on certain logs, part of them were removed by defendant from that jurisdiction and brought into this state. In due time a decree was rendered establishing such lien, but the lien claimant could not enforce his decree, the logs being gone. Subsequently claimant began this action against the defendant in this state for damages caused by removing the logs, under a statute of the sister state providing for such an action against any one destroying or rendering difficult the identification of logs covered by a lien, and the decree establishing the lien is competent evidence for plaintiff, as it tends to show that the logs were subject to a lien when taken. *Bergman v. Inman*, 456.

LOGS.

ESTOPPEL AGAINST DAMAGE ACTION BY WAIVING LIEN.

One having a logger's lien under a statute of a foreign state is not estopped from pursuing the action for damages conferred by such statute on any one destroying or rendering uncertain the identification of the property covered, by the fact that, though knowing that the owner's assignee had taken possession of the logs and removed them from that state, he nevertheless failed to enforce his lien in the jurisdiction whither the property had been taken; for he had his choice of a lien suit or a damage action, and the right to prefer was his. *Bergman v. Inman*, 456.

MARRIAGE. See DIVORCE.

MARRIED WOMEN.

Contracts of Relating to Dower and Curtesy. See HUSBAND & WIFE.

MASTER AND SERVANT.

DUTY OF MASTER TO PROVIDE SAFE PLACE TO WORK.

1. In an action by a locomotive engineer against his employer to recover damages for an injury caused by his running into a slide on the track on a dark stormy night, an instruction that the action of the company in constructing its track in a manifestly dangerous place, when, with reasonable care and at slight expense, it could have been constructed in a perfectly safe place, a few feet to one side, might be negligence which the jury could consider in determining the degree of diligence which the company should have exercised in watching, inspecting, and protecting its road, is erroneous, the company not being chargeable with negligence in locating its roadbed. *Scott v. Astoria Railroad Co.* 28.

QUESTION OF NEGLIGENCE FOR JURY.

2. A servant was injured by the fall of a heavy timber, due to the breaking of the rope by which it was being lowered. The master was personally superintending the work. The rope had been in use in the work for some time, was old, and, owing to the manner of doing the work, was subject to constant chafing over sharp edges. It broke without extraordinary strain, and had parted the day before. *Held*, that the evidence required the submission of the master's negligence to the jury.

Geldard v. Marshall, 438.

ASSUMPTION OF RISK BY SERVANT.

3. A servant who has assisted but once in lowering timbers by a rope, being then assigned to other work, does not assume the risk of the rope's breaking, even though he knows it parted the previous day through the alleged carelessness of a workman; it not appearing that he had actual knowledge of any defect therein. Moreover, knowing of the breaking, he had a right to assume that a new rope had been substituted by the master.

Geldard v. Marshall, 438.

MEASURE OF DAMAGES.

Discussion of Interest as a Measure of Damages for Unlawfully Retaining Possession of Chattels. See *La Vie v. Crosby*, pp. 617, 618.

MECHANICS' LIENS.

EVIDENCE AS TO PURCHASE OF LIENABLE ITEMS.

1. In this suit to foreclose a mechanics' lien for hardware furnished by plaintiff for use in the erection of defendant's building, the evidence fairly shows that defendant purchased from plaintiff the entire bill of goods charged to him.

Cline v. Shell, 372.

EVIDENCE OF VALUE OF LIENABLE ITEMS.

2. The evidence sustains the finding by the trial court as to the reasonable value of the hardware for which the lien is claimed.

Cline v. Shell, 372.

AGENCY OF CONTRACTOR.

3. Where the owner of a building, according to the contractor's testimony, asked the contractor whether, if he bought some sheathing paper, he (the contractor) would put it down so as to prevent the floors being injured, and the contractor replied "Yes," and the owner thereupon said, "Well, get it here, and I will pay for it," whereupon the contractor ordered it for plaintiff, and the contractor's statement was corroborated by the owner himself, it sufficiently appeared that the contractor was the owner's agent in ordering the paper, and plaintiff's notice of lien properly included that item.

Cline v. Shell, 372.

MEDICAL EXPERTS.

Testimony of Must be Referable to the Evidence. See EVIDENCE, 15.

MINES AND MINERALS.

EVIDENCE OF LOCATION OF CLAIM.

1. The evidence sustains the finding of the trial court that assessment work done by defendants on a previous claim embracing the land contained in plaintiff's location was not within the limits of such prior claim, and that the same was therefore subject to relocation.

Wagner v. Dorris, 392.

EVIDENCE OF VALUE OF ASSESSMENT WORK.

2. The evidence sustains the finding of the trial court that the assessment work in dispute was not of greater value than fifty dollars.

Wagner v. Dorris, 392.

MISCONDUCT OF TRIAL JUDGE.

Remarks on Case in Presence of the Jury. See TRIAL, 1.

MISTAKE.

Not Necessary to Show to Obtain Equitable Relief. See QUIETING TITLE, 5.

MORTGAGES.

FORECLOSING LIEN BASED ON OUTLAWED NOTE.

1. A mortgage made to secure the payment of a note that has since become unenforceable by the lapse of time may still be enforced if the statute has not run against it too. *Overholt v. Ditz*, 194.

PRIORITY BETWEEN MORTGAGE LIEN AND TAX LIEN.

2. While Section 2821, Hill's Ann. Laws, was in force, the lien of a mortgage, and the right of a purchaser under it, was superior to all rights acquired under a tax assessed and levied on the property subsequent to the execution of the mortgage. *Middleton v. Moore*, 357; *Ferguson v. Kaboth*, 414.

INJUNCTION AGAINST WASTE BY MORTGAGOR IN POSSESSION.

3. A mortgagee of land may maintain a suit to restrain waste by the mortgagor that will impair the value of the property as security for the debt. For example, in this instance defendant mortgaged 1,800 acres of timber land, and the timber on 400 acres more, the principal value of the security being the growing trees. The defendant installed a valuable logging and sawing plant to manufacture the standing timber into lumber, and was operating it when this suit for an injunction was filed. *Held*, that the trial court properly restrained further operations by defendant, though it would take ten years to remove all the timber, and the mortgage was entirely due in two years, for the removal of a fifth of the property pledged would be a material reduction of the security not contemplated by the contract. *Beaver Lumber Co. v. Eccles*, 400.

IMPAIRMENT OF MORTGAGE SECURITY — FACTS IN EVIDENCE.

4. Timber land valued at \$47,500 is not disproportionate security for a mortgage of \$30,000 subordinate to a previous lien of \$5,000, in view of the known fluctuations in timber and lumber. *Beaver Lumber Co. v. Eccles*, 400.

WASTE BY MORTGAGOR — BOND OF INDEMNITY.

5. In a case where a mortgagor should be enjoined from continuing waste on the mortgaged property, defendant ought not to be permitted to continue his destruction upon filing a satisfactory bond, either for the payment of the debt when due, or to indemnify plaintiff for such damages as he may suffer by the diminution of the security. *Beaver Lumber Co. v. Eccles*, 400.

CHATTEL MORTGAGE FOR FUTURE ADVANCES — TACKING DEBTS.

6. The future advances ordinarily contemplated by a mortgage security are such as may be made by the mortgagee himself, and, unless particularly provided for, the latter cannot enforce the mortgage for debts due by the mortgagor to others and assigned to him. *Backhaus v. Buells*, 568.

Precedence of Tax Lien Over Mortgage. See TAXATION, 3.

MOTION

To Affirm or Dismiss — Choice of Remedies. See APPEAL, 9, 10.

To Dismiss Appeal — Specifying Reasons. See APPEAL, 13.

MUNICIPAL CHARTERS. Same as CHARTERS OF CITIES.

MUNICIPAL CORPORATIONS.

VOID PUBLIC IMPROVEMENT — POWER OF COUNCIL — CURATIVE ACT.

Section 156 of the Portland Charter of 1898 (Laws 1898, pp. 101, 163), providing for an action by the city to recover the cost of a public improvement that shall have been judicially declared invalid, does not apply to a case where the city lost its power by the filing of a valid remonstrance. The filing of a valid remonstrance against a public improvement deprives the city entirely of the power to proceed further therewith, its subsequent proceedings in such matter, if any, are wholly void, and the city cannot invoke the supplemental remedy provided by section 156. *Portland v. Oregon Real Estate Co.* 423.

See, also, INTOXICATING LIQUORS.

MUTUAL BENEFIT SOCIETIES.

EFFECT OF PROOFS OF DEATH FURNISHED BY OFFICERS.

Adverse statements made by the officers or agents of a mutual benefit society in accordance with its rules are competent evidence as admissions against interest: for instance, where the by-laws of a mutual benefit society provided that on the death of a member the officers of the local society to which he belonged should furnish full proof of death on printed blanks prepared for that purpose, which also required the local officers to give their opinion as to the validity of the beneficiary's claim against the society, the local officers must be considered the agents of the general society, and their statements and admissions thus made against the interest of the general organization are competent evidence in an action on the benefit certificate.

Patterson v. United Artisans, 333.

NECESSARY PARTIES. See **APPEAL**, 4.

NEGLIGENCE.

CARE REQUIRED OF CHILDREN—QUESTION FOR JURY.

1. Children of tender years are not held to the same degree of care in avoiding danger as adults, and whether a young child was guilty of contributory negligence in a given case is a proper question for the jury to decide, having in mind the age and development of the child and the conditions surrounding the occurrence.

Schleiger v. Northern Terminal Co. 4.

EVIDENCE OF CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

2. The evidence in this case on behalf of plaintiff was sufficient to carry the case to the jury on the question of negligence, and its weight is exclusively for the jury's consideration.

Schleiger v. Northern Terminal Co. 4.

See, also, **RAILROADS**, 1.

NEGOTIABLE INSTRUMENTS. Same as **BILLS & NOTES**.

NEW TRIAL.

IMPEACHING VERDICT BY AFFIDAVIT OF JUROR.

Affidavits or statements of jurors will not be received to impeach their verdict.

State v. Smith, 100.

Remanding Case for New Trial or for Directed Judgment. See **APPEAL**, 20, 21.

NONINTERVENTION WILL in Washington. See **EXECUTORS**, 1.

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Grant v. Paddock, 30 Or. 312, applied, 314.
Grant County v. Lake County, 17 Or. 463, cited 471.
Hamilton v. Gordon, 22 Or. 557, applied, 570.
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Hammer v. Downing, 39 Or. 504, followed, 488.
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Hass v. Sedlak, 9 Or. 462, cited, 519.
Hearn v. Louttit, 42 Or. 572, cited, 292.
Hendrix v. Gore, 8 Or. 408, cited, 571.
Hill v. Cooper, 6 Or. 181, applied, 4.
Hilts v. Hilts, 43 Or. 162, distinguished, 530, 535.
Hindman v. Rizer, 21 Or. p. 116, cited in footnote, 244.
Horseman v. Horseman, 43 Or. 83, approved, 153 (cited in footnote, 149.)
Houghton v. Beck, 9 Or. 325, applied, 509.
House v. Fowle, 20 Or. 163, followed, 151.
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Houston v. Timmerman, 17 Or. 499, cited, 459.
Hubler v. Gaston, 9 Or. 66, cited, 569, 570.
Hughes v. Linn County, 37 Or. 111, approved, 361.
Hughes v. Walker, 14 Or. 481, cited, 286.

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Jackson v. Jackson, 17 Or. 110, distinguished, 244, 252 (cited in footnote, 244).

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Jenkins v. Hall, 26 Or. 79, followed, 151.

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Kimball v. Redfield, 33 Or. 292, cited, 570.

Kitcherside v. Myers, 10 Or. 221, distinguished, 244, 247, 251 (cited in footnote, 244).

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Martin v. Eagle Develop. Co. 41 Or. 448, cited, 627.

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Matlock v. Wheeler, 29 Or. 64, approved, 30.

Mayes v. Stephens, 38 Or. 512, cited, 570, 575.

McAlister v. Long, 33 Or. 363, approved, 32.

McBride v. Northern Pac. R. Co. 19 Or. 64, distinguished, 14, 15.

McDonald v. American Mort. Co. 17 Or. 628, footnote, 261.

McDonald v. Crusen, 2 Or. 258, applied, 164, 535.

McFarlane v. Cornelius, 43 Or. 513, followed, 585.

McIntyre v. Kramm, 12 Or. 253, cited, 277.

McNary v. Bush, 35 Or. 114, followed, 523.

McNary v. Wrightman, 32 Or. 573, distinguished, 357, 365.

Mendenhall v. Harrisburg Water Co. 27 Or. 38, distinguished, 243, 247.

Merchants' Nat. Bank v. Pope, 19 Or. 35, applied, 314.

Middleton v. Moore, 43 Or. 357, followed, 420, 422.

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Moores v. Clackamas County, 40 Or. 536, cited, 271, 274.

Moores v. Moores, 36 Or. 261, cited, 284.

Morrill v. Morrill, 20 Or. 96, followed, 523.

Municipal Sec. Co. v. Baker County, 33 Or. 338, cited, 471, 472.

Muldrick v. Brown, 37 Or. 185, distinguished, 243 (cited in footnote, 243, 244, 248).

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Nickum v. Gaston, 24 Or. 380, distinguished, 357, 365.

Nine v. Starr, 8 Or. 49, cited, 78.

Nodine v. Shirley, 24 Or. 250, applied, 314.

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 Nosler v. Coos Bay R. Co. 39 Or. 331, approved, 258.
 Oatman v. Epps, 15 Or. 437, applied, 4.
 Oliver v. Oregon Sugar Co. 42 Or. 276, applied, 154 (cited in footnote, 149).
 Oregon R. Co. v. Bridwell, 11 Or. 282, cited, 282.
 Oregon & W. Sav. Bank v. Catlin, 15 Or. 342, cited, 231.
 Oregonian R. Co. v. Hill, 9 Or. 377, cited, 541.
 Osgood v. Osgood, 35 Or. 1, cited, 528.
 Owens v. Snell, 29 Or. 443, cited, 350.
 Pacific Livestock Co. v. Gentry, 38 Or. 275, distinguished, 244, 253.
 Pacific Lum. Co. v. Prescott, 40 Or. 374, applied, 314.
 Parker v. Furlong, 37 Or. 248, cited in footnote, 243, 244.
 Partlow v. Singer, 2 Or. 307, cited, 609.
 Pengra v. Wheeler, 24 Or. 532, cited, 630.
 Perham v. Portland Elec. Co. 33 Or. 451, cited, 9.
 Perkins v. McCullough, 36 Or. 146, cited, 104.
 Petrain v. Klerman, 23 Or. 455, applied, 356, 386.
 Portland v. Besser, 10 Or. 242, cited, 174.
 Powell v. Dayton S. & G. R. R. Co. 14 Or. 22, cited, 281.
 Pursel v. Deal, 16 Or. 295, cited, 304.
 Putman v. Southern Pac. Co. 21 Or. 230, 239, distinguished, 4, 12.
 Rader v. Barr, 37 Or. 453, followed, 487.
 Ramsby v. Beezley, 11 Or. 49, cited, 104.
 Rayburn v. Davison, 22 Or. 242, cited, 386.
 Raymond v. Flavel, 27 Or. 219, cited, 391 (cited in footnote 281).
 Reid v. Alaska Packing Co. 43 Or. 429, applied, 630.
 Reinstein v. Roberts, 34 Or. 87, cited, 570, 575, 585.
 Riley v. Pearson, 21 Or. 15, cited, 269.
 Rolfes v. Russel, 5 Or. 400, cited, 627.
 Rosendorf v. Baker, 8 Or. 240, approved, 321.
 Rosenthal v. Kahn, 19 Or. 571, applied, 570.
 Russel v. Lillenthal, 36 Or. 105, cited in footnote, 149.
 Sabin v. Columbia Fuel Co. 25 Or. 15, cited, 571.
 Salem Traction Co. v. Anson, 41 Or. 562, followed, 35 (cited in footnote, 261).
 Savage v. Savage, 19 Or. 112, followed, 206, 216.
 Savage v. Savage, 36 Or. 293, distinguished, 346, 351.
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 Shipley v. Hacheney, 34 Or. 303, cited, 312.
 Simon v. Northup, 27 Or. 487, distinguished, 465, 475.
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 Smith v. Gardner, 12 Or. 221, cited, 247 (in footnote, 244).
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 Smitson v. Southern Pac. Co. 37 Or. 74, approved, 30.
 Sommer v. Island Merc. Co. 24 Or. 214, cited, 575, 585.
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 State v. Abrams, 11 Or. 169, distinguished, 73, 83, 330.
 State v. Anderson, 10 Or. 448, approved, 33, 74, 110.
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 State v. Bergman, 6 Or. 341, applied, 47, 147.
 State v. Brown, 28 Or. 147, applied, 110, 216.
 State v. Carr, 6 Or. 133, approved, 47, 147.
 State v. Carver, 22 Or. 602, cited, 187.
 State v. Ching Ling, 16 Or. 419, applied, 110, 157, 158.
 State v. Dale, 8 Or. 229, cited, 47, 147, 178.
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 State v. Ellsworth, 30 Or. 145, cited, 453.
 State v. Fletcher, 24 Or. 295, 297, applied, 451.
 State v. Garrand, 5 Or. 216, applied, 157.
 State v. Gibson, 43 Or. 134, cited, 333; approved, 456.
 State v. Glass, 5 Or. 73, applied, 110, 157.
 State v. Hanlon, 32 Or. 85, approved, 49.
 State v. Hawkins, 18 Or. 476, approved, 117, 161.
 State v. Henderson, 24 Or. 100, applied, 110.
 State v. Huffman, 16 Or. 15, 24, approved, 190.
 State v. Humphreys, 43 Or. 44, cited, 212.
 State v. Ingram, 23 Or. 434, followed, 216.
 State v. Johnson, 7 Or. 210, cited, 117.
 State v. Kelly, 23 Or. 225, followed, 216.
 State v. Lee, 33 Or. 506, applied, 48.
 State v. Lucas, 24 Or. 163, distinguished, 45, 60.
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 State v. Morey, 25 Or. 241, approved, 115, 116, 161, 333.
 State v. Olberman, 33 Or. 556, followed, 216.
 State v. Olds, 19 Or. 897, approved, 117.
 State v. Pomeroy, 30 Or. 16, applied, 56, 212.
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 State v. Reinhart, 26 Or. 466, followed, 35.
 State v. Sargent, 32 Or. 110, applied, 110, 158.
 State v. Saunders, 14 Or. 300, applied, 21, 216, 330.
 State v. Savage, 36 Or. 191, applied, 49, 56, 212.
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 Teal v. Collins, 9 Or. 89, cited, 271.
 Tenny v. Mulvaney, 8 Or. 129, applied, 154, (cited in footnote, 149).
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 Tribou v. Strowbridge, 7 Or. 156, cited in footnote, 261.
 Trullenger v. Todd, 5 Or. 36, cited, 519.

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Wallace v. Suburban Ry. Co. 26 Or. 174, applied, 15.

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Wheeler v. Lack, 37 Or. 238, followed, 486.

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Willis v. Lance, 28 Or. 371, cited, 34.

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Wong v. Astoria, 13 Or. 533, followed, 148, 276.

Wood v. Riddle, 14 Or. 254, cited, 231.

Woodruff v. County of Douglas, 17 Or. 314, distinguished, 234.

Woodard v. Baker, 10 Or. 491, followed, 523.

Wormington v. Pierce, 22 Or. 606, cited, 472.

OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OREGON STATUTES. Same as STATUTES OF OREGON.

OTHER CRIMES.

Right to Show Other and Disconnected Offences. See CRIMINAL LAW, 7.

OVERRULED CASES. See OREGON CASES.

PARENT AND CHILD.

RIGHT OF ACTION BY PARENT FOR WRONGFUL DEATH OF MINOR.

1. The right of action for causing the death of a minor child, conferred by Section 34, B. & C. Comp., on the parents of the deceased, is not exclusive of the right of the personal representative of a deceased minor to sue for causing the death under section 381. *Schleiger v. Northern Terminal Co.* 4.

CONTRACT OF CHILD FOR NECESSARIES FURNISHED TO PARENT.

2. Children are liable for necessities furnished to an indigent parent at their special request just as they are liable on any other contracts they may make, though they may not be liable for necessities furnished without a request, as at common law there was no legal obligation on a child to support its parent.

Belknap v. Whitmire, 75

STATUTORY LIABILITY OF CHILD TO SUPPORT PARENT.

3. The statutory method of enforcing the liability of a child for the support of its indigent parent (B. & C. Comp. §§ 2654, 5254), is exclusive, and where such claims are made under the statute the child can be held liable only in the manner there provided.

Belknap v. Whitmire, 75.

PAROL EVIDENCE

To Show Real Transaction — Apparent Sale. See EVIDENCE, 12.

To Establish Trust in Personal Property. See EVIDENCE, 13.

PAROL AGREEMENTS

Between Relatives—Possession as Part Performance. See STAT. OF FRAUDS, 4.

PARTIES.

PLEADING—REAL PARTY IN INTEREST.

1. The defense that a suit is not brought by the real party in interest is proper only where it appears that defendant is cut off from a just offset or counterclaim against plaintiff's demand, and that a judgment in favor of plaintiff will not fully protect defendant when discharged.

Sturges v. Baker, 236.

IDEM.

2. The defense that the plaintiff is not the real party in interest, and therefore not entitled to maintain the proceeding, must be specially pleaded, and such facts stated as to disclose who the real party may be. *Overholt v. Dietz*, 191.

See, also, **BILLS & NOTES** and **PARTNERSHIP**.

PARTITION.**WHAT DECREE IS APPEALABLE.**

1. Sections 441, 442, and 444, B. & C. Comp. contemplate an interlocutory decree defining the rights of the respective parties in the land of which partition is desired, and deciding whether it shall be divided or sold, to be followed by a final decree upon a consideration of the report of the referees, and this last is the final order contemplated by Section 547, B. & C. Comp. that must be appealed from, though on the appeal intermediate orders involving the merits, and necessarily affecting the decree, may be reviewed. *Sterling v. Sterling*, 200.

NECESSITY OF PLEADING POSSESSION BY PLAINTIFF.

2. Under Section 435, B. & C. Comp. the plaintiff in a partition suit must allege possession of the property to be divided as a tenant in common with the defendants, or the pleading is demurrable, unless the suit is brought by one or more tenants in common of a vested remainder or reversion. *Sterling v. Sterling*, 200.

INSUFFICIENT ALLEGATION OF POSSESSION.

3. A complaint in partition alleging that plaintiff and defendants are tenants in common of the property sought to be partitioned is not plea that plaintiff is in possession, for there may be an ownership as a tenant in common without possession. *Sterling v. Sterling*, 200.

PARTNERSHIP.**RIGHT OF SURVIVING PARTNER TO SUE AS REAL PARTY IN INTEREST.**

Where, on the dissolution of a partnership, the outgoing partner takes from a debtor a note, in which are included debts due to each partner individually and to the firm, and after the outgoing partner's death his executrix turns the note over to the surviving partner, the latter may maintain suit thereon as administrator of the partnership estate, though the code provides that every suit shall be prosecuted in the name of the real party in interest. *Overholt v. Dietz*, 191.

PART PERFORMANCE.

Agreement Between Relatives — Possession. See **STATUTE OF FRAUDS**, 4.

PART PAYMENT by Joint Debtor — Effect Of. See **LIM. OF ACTIONS**, 2.

PAYMENT.

Effect of Part Payment by Joint Debtor. See **LIM. OF ACTIONS**, 2.

PERSONAL INJURIES. See **MASTER & SERVANT** and **RAILROADS**.

PHOTOGRAPHS as Evidence. See **EVIDENCE**, 7, 8.

PHRASES. Same as **WORDS & PHRASES**.

PLEADING.**COMPLAINT — WAIVING SUFFICIENCY OF BY NOT DEMURRING.**

1. Under B. & C. Comp. § 72, providing that, if no objection be taken by demurrer or answer, defendant shall be deemed to have waived the same, excepting the objection that the complaint does not state facts sufficient to constitute a cause of action, a failure to demur to a count of a complaint on the ground that it does not state facts sufficient to constitute a cause of action is not a waiver of the objection. *Moore v. Halliday*, 243.

STATEMENT OF SEPARATE CAUSES OF ACTION.

2. The material matter of each separate cause of suit or action stated in a pleading must be complete within itself. *Moore v. Halliday*, 243.

REFERENCE TO EXHIBITS.

8. An allegation in a pleading that the pleader is the owner of certain real property, "as is shown by the abstract of title hereto attached and made part hereof," an abstract being actually fastened to the pleading and identified, is not a reference to the abstract, but amounts to a plea that the title was derived from and through the persons named therein. *McLeod v. Lloyd*, 280.

CONSTRUCTION OF PLEADING AS TO THE PLEADER.

4. Pleadings are usually construed against their authors in cases where the meaning is uncertain. *Graham v. Merchant*, 294.

IDEM.

5. In an action for money had and received, brought by a vendee of land under a contract providing that the vendor might rescind and forfeit payments then made, in case any required payment should not be made at the appointed time, where it appeared that the last installment of the purchase price was due on March 15th, and that a stated sum had been received prior to July 28th of the same year, it must be inferred that this sum was received after March 15th. *Graham v. Merchant*, 294.

ANSWER—IMPLIED ADMISSION BY IRRELEVANT DENIAL.

6. Where a complaint alleged that plaintiff was incorporated in New Jersey, and the answer denied that plaintiff was incorporated in California, the incorporation in New Jersey was admitted. *Herring-Marvin Co. v. Smith*, 315.

AVAILABILITY OF PARTIAL DEFENSE PLEADED AS A COMPLETE DEFENSE.

7. A partial defense pleaded to an entire cause of action, while demurrable, may be used, if not demurred to, so far as it may prove applicable to the facts. *Bergman v. Inman*, 456.

EFFECT OF JOINT GENERAL DEMURRER.

8. A joint general demurrer by several parties for insufficiency should be overruled if the pleading is good against any one of them. *Belknap v. Whitmire*, 75.

CONSTRUCTION OF PLEADING AFTER VERDICT—WAIVING DEFECTS.

9. Vague, indefinite, and uncertain pleadings are often held sufficient after the adversary has pleaded over without objection, when they would not have been sustained had the objection been made earlier. *Sturgis v. Baker*, 286; *Herring-Marvin Co. v. Smith*, 315; *Pugh v. Spicknall*, 489.

IDEM—EXAMPLE.

10. A complaint which alleges that defendant sold a business enterprise to plaintiff under an agreement that, if plaintiff should discover that he was not adapted to the business, he might rescind the contract, and on demand defendant would repay plaintiff the sum paid by him into the business; that plaintiff, within the specified period, informed defendant of his desire to rescind; that thereafter the parties agreed on the sum plaintiff should be repaid, and the business and stock was reassigned and the defendant took possession; that plaintiff had demanded payment of such sum, but defendant had refused to pay, is sufficient after verdict. *Ferguson v. Reiger*, 505.

CURATIVE EFFECT OF FINDINGS BY A COURT WITHOUT A JURY.

11. As findings made by the court in a trial without a jury are, by the express provisions of B. & C. Comp. § 159, deemed a verdict, they will cure all formal defects in a complaint, but will not supply necessary allegations. *Ferguson v. Reiger*, 505.

CURING DEFECTIVE COMPLAINT BY ANSWERING.

12. The defect in the complaint in a partition suit arising from a failure to aver that the parties were in possession of the property is not cured by an allegation in the answer that the lands described in the complaint are a part of the lands involved in a former partition suit between the parties, and that the ownership was there determined, where plaintiff in his reply denies this allegation, and on the trial offers evidence showing that the lands involved in the former suit were not the lands embraced in the complaint. *Sterling v. Sterling*, 200.

IDEM — EXAMPLE.

13. A contract was printed on a form headed "Herring-Hall-Marvin Co.," but was addressed "Hall's Safe & Lock Works," and the latter was referred to in the body of the instrument as the contracting party. The complaint alleged that the contract was made with the Herring Co. *Held*, that after answer the complaint will be considered as inferentially alleging that the Herring Co. and the Hall Works are the same organization. *Herring-Marvin Co. v. Smith*, 375.

IDEM — EXAMPLE.

14. Where a receipt given to a sheriff by garnishees acknowledged the receipt of property of the judgment debtor, which receiptors agreed to hold until ordered "to release the same" by the sheriff, an allegation in the complaint in an action by the sheriff for breach of the contract to return the property, that plaintiff had demanded possession of the property, which receiptors refused and still refuse to deliver, was sufficient, after answer, as an allegation of breach of the agreement to return the property. *Colbath v. Hoefer*, 366.

See, also, **BILLS & NOTES, INJUNCTIONS, and SALES.**

POLYGAMY.**ALLEGING EXISTENCE OF MARRIAGE RELATION.**

1. Under B. & C. Comp. § 1918, providing that if any person having a former husband or wife living shall marry another person, or live and cohabit with another person as husband or wife, such person shall be deemed guilty of polygamy, an information for that offense must show that the former spouse was still living and at the time stated still was spouse to the person charged. *State v. Durphy*, 79.

INFORMATION — DUPLICITY.

2. An information for polygamy, under B. & C. Comp. § 1918, charging that the accused, having a wife, feloniously married another woman in Illinois, and thereafter feloniously cohabited with her in Oregon, does not charge two crimes,— the second marriage and cohabitation,— for a marriage in another state would not be an offense against the laws of Oregon. *State v. Durphy*, 79.

CONSTRUCTION OF INFORMATION FOR POLYGAMY.

3. An information charging that a stated person married a woman in Massachusetts, "and, while she was still his wife," feloniously married another woman in the State of Illinois, and subsequently cohabited with the latter in Oregon, does not charge the crime of polygamy in Oregon, inasmuch as the phrase, "and while she was still his wife," refers to the time of the second marriage, and not to the cohabitation in Oregon. *State v. Durphy*, 79.

PORTLAND.

Charter 1898, § 156, *Oregon Real Estate Co. v. Portland*, 424, 426.

PORT OF PORTLAND.

Construction of Act of 1903 Relating Thereto. See **STATUTES**, 3.

POSSESSION

Of Stranger as Notice of Equities. See **VENDOR & PURCHASER**, 8, 9, 10.

Of Tenant — Rights of Landlord. See **VENDOR & PURCHASER**, 12.

Of Grantor as Notice of His Claim. See **VENDOR & PURCHASER**, 11.

POWER OF COURT to Set Aside Orders After the Term. See **JUDGMENTS**, 4.

PRACTICE IN SUPREME COURT.

Remanding Case Decided on Demurrer. See **APPEAL**, 22.

Amending Pleading After Remandment. See **APPEAL**, 23.

Directing a Specified Judgment on Reversal. See **APPEAL**, 20, 21.

Allowing Costs Where Judgment is Modified. See **COSTS**, 5.

Time Allowed for Filing Cost Bills. See **COSTS**, 2.

PRELIMINARY EXAMINATION.

Filing Information Without Previous Hearing. See CRIMINAL LAW, 4.

PRESCRIPTION.

Acquiring Easement by Long Continued Use. See HIGHWAYS, 1, 2.

PRESUMPTIONS. See EVIDENCE, 2.

PRINCIPAL AND AGENT.

INSTRUCTION AS TO GOOD FAITH OF AGENT.

1. Defendant sold lumber to plaintiff to be shipped to plaintiff's customers in another country; the contract providing that, if a dispute arose at the port of discharge as to the quality of the lumber, defendant should appoint an agent on the spot to settle it. A dispute arose, and defendant appointed plaintiff its agent to settle. Plaintiff selected certain surveyors to examine the lumber and report what allowance should be made to the buyers. These surveyors recommended a certain reduction, and plaintiff settled with the buyers on this basis. Under these facts an instruction that if plaintiff's foreign house used reasonable care in selecting surveyors to examine the lumber, and in reliance on their report settled the dispute in good faith, the defendant is bound by such settlement, was properly refused as being inappropriate, for the surveyors were merely a means used by the plaintiffs and were in no sense agents of defendant.

Williamson v. North Pac. Lum. Co. 337.

AGENT AS REAL PARTY IN INTEREST.

2. The holder of the legal title to real property may maintain a suit to remove a cloud from the title, though he holds in trust for an undisclosed principal, since such an agent may sue in his own name.

McLeod v. Lloyd, 260.

BURDEN OF PROOF IN CASES OF AGENCY.

3. Where defendant denies the execution of an instrument sued on, the question is whether the act of the party signing such instrument, if not defendant, was binding on her, either because she authorized or subsequently ratified it, and the burden of proof is on plaintiff to establish the agency or ratification.

Sears v. Daly, 346.

IMPLIED WARRANTY OF AUTHORITY BY AGENT—DAMAGES.

4. Where an agent makes a contract on behalf of his principal in excess of his authority, he is personally liable thereon, under an implied warranty of authority, even though he made no false representations concerning his authority.

Anderson v. Adams, 621.

FORM OF ACTION ON BREACH BY AGENT OF UNAUTHORIZED CONTRACT.

5. In an action against an agent for damages caused by not complying with a contract on behalf of his principal in excess of his authority, in which there is no allegation that defendant falsely represented himself to be the agent of the party in whose behalf the contract was made, the action is in contract for breach of an implied warranty of authority and not in tort for deceit.

Anderson v. Adams, 621.

ADMISSIONS BY AGENT AGAINST INTEREST OF HIS PRINCIPAL.

6. Under the general rule that admissions against interest are competent evidence against one making them, it is competent and material, in a damage action against an agent for not performing a contract that he had made without authority, to show that after the contract was made the agent stated that he had no authority from his principal to make it.

Anderson v. Adams, 621.

EFFECT OF PROOFS OF DEATH FURNISHED BY OFFICERS.

7. Adverse statements made by the officers or agents of a mutual benefit society in accordance with its rules are competent evidence as admissions against interest.

Patterson v. United Artisans, 333.

QUESTIONS FOR COURT AND JURY RESPECTIVELY.

8. Whether a person was or was not the agent of another is a question of fact for the jury, but what may be done by the agent under the power conferred is a question of law for the judge. *Anderson v. Adams*, 621.

EVIDENCE OF TERMS OF AGENCY.

9. The evidence offered herein on the question of the extent of the agency involved does not show that defendant had authority from his principal to make the contract he did make. *Anderson v. Adams*, 621.

RATIFICATION OF UNAUTHORIZED ACT OF AGENT—*RES GESTÆ*.

10. Where an agent of a seller has exceeded his authority, declarations of the seller's officers, on receiving a memorandum of the contract, is admissible in the buyer's action for a breach, both as part of the *res gestæ* and as bearing on the question of ratification. *Reid v. Alaska Packing Co.* 429.

PRIORITIES

Between Mortgages and Tax Deeds. See MORTGAGES, 2.

PROCESS.

PUBLICATION—WHAT IS DEFENDANT'S "PLACE OF RESIDENCE."

1. An affidavit for the publication of a summons stating that "defendant is now and was during all the times hereinafter mentioned a resident and inhabitant of this state, and has departed therefrom" and is now at a stated place in a foreign country, inferentially shows that defendant has a fixed and permanent abode in Oregon, but is now temporarily residing elsewhere, and the point of such present sojourning is his "place of residence," within the meaning of that expression in B. & C. Comp. § 57, line 8. *McFarlane v. Cornelius*, 513.

DIFFERENCE BETWEEN DWELLING HOUSE AND PLACE OF RESIDENCE.

2. The terms "dwelling house" and "usual place of abode," used in B. & C. Comp. § 55, subd. 5, providing for serving process on a member of defendant's family, are synonyms signifying domicile, and have a different meaning from "place of residence," found in section 57, line 8, directing whither the pleadings shall be sent by mail if defendant cannot be served within the state. The former terms refer to the place of permanent dwelling in this state, while the latter applies to defendant's residence, either permanent or temporary, in another state or country. *McFarlane v. Cornelius*, 513.

PURPOSE OF PUBLISHING SUMMONS.

3. The object to be accomplished by a publication and mailing of a summons, as directed by Section 57, B. & C. Comp., is to notify the party of the pendency of the suit, and the summons and complaint should be mailed to him wherever he may happen to be at the time, rather than to his place of permanent abode. *McFarlane v. Cornelius*, 513.

SPECIFYING IN THE ORDER THE TIME OF APPEARANCE.

4. "The time prescribed in the order for publication," which must be specified in a published summons, under Section 57, B. & C. Comp., means the number of weeks considered by the judge making the order to be reasonable for publication, so that an order directing a summons to be printed for six consecutive weeks does prescribe "the time for publication," within the meaning of B. & C. Comp. § 57, line 16. *McFarlane v. Cornelius*, 513.

RETURN AND PROOF OF PUBLICATION.

5. B. & C. Comp. § 822, declaring that proof of publication of a notice required to be published in a newspaper may be made by the affidavit of the printer, etc. but that such affidavit must be made within six months after the last day of publication, is directory only; and hence a failure of the printer to make affidavit within that time to the publication of a summons does not affect the jurisdiction of the court to render judgment thereon, if the affidavit is made and filed before the making of the final order. *McFarlane v. Cornelius*, 513.

See, also, DIVORCE, 1.

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PUBLIC IMPROVEMENTS.

Effect of Valid Remonstrance—Applicability of Curative Act in Such Cases—Scope of Act. See **MUNICIPAL CORPORATIONS**.

PUBLIC LANDS.

AGREEMENT TO CONVEY HOMESTEAD.

1. A contract to convey the land that he has entered under the laws of the United States made by a homestead claimant before the issuance of a patent is void and unenforceable in the courts, since it is a violation of the public policy of the national government, as indicated by Sections 2200 and 2201 of the Rev. Stat. U. S., which require that lands entered as homesteads must be for the purpose of actual settlement by the claimants, and that the patent shall issue only on the affidavit of the entrymen that no part of the land has been alienated.

Horseman v. Horseman, 83.

INJUNCTION—INCOMPLETE TITLE TO PUBLIC LAND—POSSESSION.

2. A qualified settler on public land, who is in possession but whose title is yet uncompleted, cannot maintain a suit to quiet title thereto. *Moore v. Halliday*, 243.

PUBLIC POLICY.

Conveying Homestead Before Patent. See **PUBLIC LANDS**, 1.

PUNCTUATION is Not Part of an Act. See **STATUTES**, 4.

QUESTION FOR JURY.

Negligence of Railroad at Grade Crossing. See **RAILROADS**, 1.

QUESTION NOT RAISED IN TRIAL COURT. See **APPEAL**, 18.

QUIETING TITLE.

RIGHT OF ACTION—SUIT BY AGENT.

1. The legal title being vested in plaintiff, the fact that the equitable title is in another does not affect the right to maintain a suit to remove a cloud from the title. *McLeod v. Lloyd*, 280.

RIGHT OF ACTION—TITLE BY QUITCLAIM DEED.

2. The fact that the plaintiff secured a quitclaim deed immediately before instituting a suit to quiet title does not affect his right to maintain the suit.

McLeod v. Lloyd, 280.

RELIEF—PLEADING BY EXHIBIT.

3. In a suit to remove a cloud an allegation that defendant claims some interest or right of title to the specified property, as shown by an abstract of title attached to the complaint, is a sufficient specification of the particular record constituting the cloud and of the infirmity rendering it void, where the abstract shows that the deeds to defendant were executed by plaintiff's grantor after plaintiff's deeds had been regularly executed and recorded. *McLeod v. Lloyd*, 280.

43 Or.—44.

RELIEF—ALLEGING OWNERSHIP—REMEDY AT LAW.

4. In a suit to remove a cloud from title an allegation that the property was "unseated, unimproved, and unoccupied" is a sufficient statement that defendant was neither in possession nor acting as the owner thereof, within the meaning of B. & C. Comp. § 828. *McLeod v. Lloyd*, 280.

NEED OF ALLEGING FRAUD, ACCIDENT, OR MISTAKE.

5. In a suit to remove a cloud, where plaintiff claims under a quitclaim deed from persons never in possession, and defendant claims under a warranty deed for full value from the same grantor, equity has jurisdiction to determine the conflicting rights without any other basis than the opposition of the respective claims. *McLeod v. Lloyd*, 280.

QUOTATION MARKS Are Not Part of an Act. See **STATUTES**, 4.

RAILROADS.**ACCIDENT AT CROSSING—INSTRUCTION AS TO NEGLIGENCE OF COMPANY.**

1. When cars are being backed along or across a public street frequented by pedestrians, and the engineer is so situated that he cannot always see the track and adjacent space, it is the duty of the railroad company to provide a lookout man, either on the front of the nearest approaching car or at the crossing, to give warnings, and a failure so to do is negligence. *Schleiger v. Northern Terminal Co.* 4.

DANGEROUS LOCATION OF ROADBED AS NEGLIGENCE.

2. A railroad cannot be charged with negligence in the location of its roadbed; hence an instruction that the action of a railroad company in constructing its track in a manifestly dangerous place, when, with reasonable care and at slight expense, it could have been constructed in a perfectly safe place, a few feet to one side, might be negligence which the jury could consider in determining the degree of diligence which the company should have exercised in watching, inspecting, and protecting its road, was erroneous, though in other parts of the charge the court correctly stated to the jury the degree of care required by the defendant in operating its road. *Scott v. Astoria Railroad Co.* 28.

RAILWAY SPINE. See **DAMAGES**, 2.

RATIFICATION. See **Discussion** on p. 571.

REAL PARTY IN INTEREST. See **PARTIES**.

RECORDS.**FILING PAPERS—PAYMENT OF FEE.**

1. The general rule that a paper is filed when it has been delivered to the proper officer and received to be kept in the official records, does not apply where the payment of a stated fee is made a prerequisite—in the latter case the paper is not filed until the fee has been paid. *Hills v. Hills*, 162.

WHAT CONSTITUTES A FILING OF A PAPER.

2. Under B & C. Comp. § 546, providing that "a pleading or paper shall be filed by delivering the same to the clerk at his office, who shall endorse on it the day of the month and the year, and subscribe his name thereto," a paper is filed when it is delivered to the clerk with the intention that it shall become part of the official records, and such filing is not affected by the clerk's failure to endorse the same. *Conant's Estate*, 530.

REHEARING.

Questions Not Then Available for Argument. See **APPEAL**, 17.

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REMOVING CLOUD. Same as **QUIETING TITLE**.

REPEAL by Implication. See STATUTES, 3.

REPLEVIN.

RIGHT OF ACTION FOR UNSEGREGATED PART OF A LARGER MASS.

1. Where something remains to be done in preparing a chattel for delivery in pursuance of an executory contract of sale and purchase, as, in caring for a growing crop, selecting the part to be delivered and packing it for shipment, title thereto does not pass either on the signing of the contract, or on a breach of it, unless specially so provided, and there is no right of possession to support replevin. *Backhaus v. Buells*, 558; *La Vie v. Tooze*, 590; *La Vie v. Crosby*, 612.

IDEM — EXAMPLE.

2. Where a contract for the sale of a hop crop requires the seller to segregate the quantity of hops to be delivered, and put them into the condition required for acceptance, the performance of the labor necessary to the preparation of the hops for delivery is a condition precedent to the vesting of title in the buyer, in the absence of any contrary statement in the contract, and hence the contract does not pass a title sufficient to enable the buyer to maintain replevin.

Backhaus v. Buells, 558; *La Vie v. Tooze*, 590; *La Vie v. Crosby*, 612.

RIGHT OF ACTION — DUTY TO FORECLOSE AFTER GETTING POSSESSION.

3. After a mortgagee or other lien claimant of personal property has secured possession thereof by right of the lien, he must proceed with reasonable promptness to foreclose — he will not be permitted to hold it indefinitely, thus treating it as his own. *Backhaus v. Buells*, 558.

COMPETENCY OF EVIDENCE OF DELIVERY UNDER EXECUTORY CONTRACT.

4. Where replevin is brought for property contracted for delivery when it shall come into existence, it may be shown that the property was actually delivered in pursuance of the contract, as thereby the buyer perfected his title.

La Vie v. Tooze, 590.

INTEREST AS DAMAGES IN REPLEVIN ACTIONS.

5. Where, in replevin, it was found that defendant was entitled to a redelivery of the property, and the value thereof was assessed as of the date of the trial, defendant was not entitled to recover interest in addition. *La Vie v. Crosby*, 612.

REPLEVIN — AT WHAT TIME VALUE IS TO BE ESTIMATED.

6. Under Section 198, B. & C. Comp., providing that when property has been taken from a defendant in replevin, and in his answer defendant demands a return thereof with damages, he is entitled, if he prevails, to have the property restored to him, and damages for its detention, and if the possession cannot be restored he may recover the value of the property and damages for taking and withholding the same, the value of the property should be fixed as of the date of the verdict. *La Vie v. Crosby*, 612.

TRIAL — HARMLESS ERROR.

7. Where, in replevin, it was conclusively shown that the highest market value of the articles was at the time of the trial, an erroneous instruction that, if they could not be redelivered to the defendant, and he was entitled to recover, he would be entitled to the highest market price between the time of the taking and the time of the trial, was harmless, the verdict being for the value at its date.

La Vie v. Crosby, 612.

RES GESTÆ.

See CRIMINAL LAW, 8, 9, 10; EVIDENCE, 4, 5.

RESIDENCE.

What is a Party's Place of Residence for the Purpose of Publishing the Summons. See PROCESS, 1, 2, 3.

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SALES.

EFFECT OF DELIVERY TO CARRIER.

1. A contract of conditional sale, providing for shipment by the vendor at a distant point, "via best route," stipulating for safe delivery on cars at the city where the purchaser lived, at which time he should repay the vendor the freight bill, is a contract to deliver to the buyer at the place where he lived, and a delivery to a carrier for shipment is not a delivery to the buyer.

Herring-Marvin Co. v. Smith, 315.

TRANSFER OF TITLE AS BETWEEN THE PARTIES.

2. Although a bill of lading represents the property for which it was given, and title to such property, when so intended by the parties, may pass by indorsement or delivery of the bill, neither indorsement nor delivery has any such effect in passing title, except as the result of contract between the parties.

Walker v. First Nat. Bank, 102.

ACTS NOT CONSTITUTING A SALE.

3. To deposit property with a warehouseman on storage, with an intent to sell it to any one, the warehouseman included, who would give the best price, is a bailment, not a sale.

State v. Humphreys, 44.

IDEM—SEGREGATING PROPERTY TO BE SOLD.

4. Where something remains to be done in preparing a chattel for delivery in pursuance of an executory contract of sale and purchase, as, in caring for a growing crop, selecting the part to be delivered and packing it for shipment, title thereto does not pass either on the signing of the contract, or on a breach of it, unless specially so provided.

Backhaus v. Buells, 558;*La Vie v. Toose*, 590; *La Vie v. Crosby*, 612.

IDEM.

5. Where a contract for the sale of a hop crop requires the seller to segregate the quantity of hops to be delivered, and put them into the condition required for acceptance, the performance of the labor necessary to the preparation of the hops for delivery is a condition precedent to the vesting of title in the buyer, in the absence of any contrary statement in the contract, and hence the contract does not pass a title sufficient to enable the buyer to maintain replevin.

Backhaus v. Buells, 558; *La Vie v. Toose*, 590; *La Vie v. Crosby*, 612.

ACTIONS FOR PRICE—RIGHT OF ACTION ON RESCISSION.

6. Either party to an executory contract may retire from it, if he chooses, but by so doing he subjects himself to an action for damages by the other party. In such a case of course no action can be brought on the contract itself.

Herring-Marvin Co. v. Smith, 315.

ACTIONS FOR PRICE—RIGHT OF SET-OFF.

7. In cases of sales where the articles delivered are not of the kind or quality required by the contract, but the buyer elects to retain the property rather than rescind the sale, he is liable for the purchase price less such damages as he may have sustained by the breach of the contract: for instance, where a seller of sheep delivered diseased animals, which the buyer retained without rescinding or offering to rescind, the buyer was entitled, in an action for the price of the sheep, to

set off expense which he had been compelled to incur in caring for the sheep because of their diseased condition. *Steiger v. Fronhofer*, 178.

ACTIONS FOR PRICE—PLEADING RESCISSION.

8. Where an action was brought for the price of sundry sheep, an answer that the animals were bought for mutton, as the plaintiff well knew, that they were diseased and unfit for eating, that when defendant discovered their condition, some time after delivery, "he notified plaintiff that he could not use them, and that he held them subject to plaintiff's orders," is not a plea of rescission and return, for it does not state that defendant disaffirmed the contract, nor that he returned or offered to return the property, nor does it show any reason for not doing so. *Steiger v. Fronhofer*, 178.

CONDITIONAL SALE CONTRACT DISTINGUISHED FROM LEASE.

9. A contract between the owner of a chattel and another person, providing that such person shall have possession of the chattel; that he shall pay to the owner for such chattel a stated sum in specified payments as "rent"; that when this shall be done the owner will sell the chattel to such person for one dollar; that if default shall be made in the payment of the reserved rent, or in the performance of other specified conditions, the owner may retake such chattel, retain all rent then paid, and terminate the "lease"; that such other person shall hold possession of the chattel and keep it insured; and pay interest on the overdue payments, is a conditional sale and not a lease. *Herring-Martin Co. v. Smith*, 315.

CONDITIONAL SALE—REMEDY OF SELLER.

10. Where a conditional sale contract has been broken by the vendee the vendor may waive his right to recover possession of the property, and sue for the purchase price, treating the contract as executed. *Herring-Martin Co. v. Smith*, 315.

SCIENTIFIC BOOKS as Evidence. See EVIDENCE, 17, 18.

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Where there is an oral sale or gift of land between relatives, the making of valuable improvements by the donee or vendee in possession is a sufficient part performance of the contract to require a specific performance by the other party.

Pugh v. Spicknall, 489.

STATE CONSTITUTION. Same as CONSTITUTION OF OREGON.

STATUTE OF FRAUDS.

PROMISE TO PAY ANOTHER'S DEBT — ORIGINAL PROMISE.

1. Where the president of a corporation orally agreed to reimburse plaintiff for expenses and attorney's fees incurred in certain negotiations between plaintiff and the corporation, if the contract was not consummated, such promise to reimburse was original, and not a promise of the president to pay a debt of the corporation.

Manary v. Runyon, 495.

CONTRACT OF SALE AND PURCHASE.

2. A contract for the sale of goods exceeding fifty dollars in value, memoranda of which, executed by a broker who represents both parties, are delivered to and retained by each, the contract being also entered in the broker's books, is not within the statute of frauds.

Reid v. Alaska Packing Co. 429.

CONTRACT TO SELL AND BUY — EXPRESSION OF CONSIDERATION.

3. A written contract whereby one party covenants to buy and the other to sell specified goods exceeding fifty dollars in value is not within the statute of frauds, as failing to express a consideration; the mutual promises constituting considerations.

Reid v. Alaska Packing Co. 429.

OPERATION OF THE STATUTE — ORAL AGREEMENT BETWEEN RELATIVES.

4. Where there is an oral sale or gift of land between relatives, the making of valuable improvements by the donee or vendee in possession is a sufficient part performance of the contract to require a specific performance by the other party; and possession by the grantee before the gift or sale is immaterial. In this case defendant, who was a widow, and seized of a dower interest in certain real estate in which plaintiff, her daughter, had a reversionary interest, orally agreed that, if her daughter would purchase the reversionary interests of the other heirs to the land in order that she might be near defendant to look after and care for her, defendant would surrender all of the same to the daughter's use during her life, except the right of common pasturage. Plaintiff, who was in possession, relying on this agreement, purchased the shares of the other heirs, and placed improvements on the property to the value of several hundred dollars. Held, that, since plaintiff was a relative of defendant, plaintiff's possession and the making of valuable improvements on the land by her was sufficient to take such oral agreement out of the statute of frauds; and the fact that plaintiff's possession of the land antedated the parol agreement was immaterial, the consideration for the contract being the care and attention plaintiff was able to bestow on her mother in consequence of her adjacent residence, and the improvements not having been made until after the agreement was entered into.

Pugh v. Spicknall, 489.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES.

SUFFICIENCY OF TITLE OF AMENDATORY ACT.

1. The requirement of Const. Or. Art. IV, § 20, that "every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title," is complied with, in the case of an amendatory act, by any designation that identifies with reasonable certainty the law to be modified.

State ex rel. v. Banfield 287.

EFFECT OF AMENDMENT ON ORIGINAL STATUTE.

2. An amendment of a law under a constitutional provision requiring the statute to be set out in full as amended operates as an entire obliteration of the former statute from the time the new law goes into effect, and nothing can thereafter be done under its authority. *Flanders v. Multnomah County*, 588.

CONSTRUCTION—MEANING OF LEGISLATURE.

3. The act of 1908, purporting to amend the statutes relating to The Port of Portland (Laws, 1908, p. 389), was intended as an amendment of the act of 1901 on the same subject. This is evident from the language of the title of the act, and from a comparison of the act of 1901 with an act on the same subject in 1899, which does not contain any sections numbered to correspond with those revised by the latest act. *State ex rel. v. Banfield*, 287.

CONSTRUCTION OF STATUTES—QUOTATION MARKS.

4. Quotation marks are points of punctuation, and, like other such points, are not controlling in determining the real meaning of an act or its title, but may be entirely disregarded or rearranged as the meaning may require. *State ex rel. v. Banfield*, 287.

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Power to Modify Judgments and to Direct the Entry of Particular Judgment by Lower Court. See APPEAL, 20, 21.

Power to Adjudge Costs in Law Actions. See COSTS, 5.

Remanding Equity Case for Taking of Further Testimony or to Bring in Additional Parties. See APPEAL, 23, 24.

What Statute Controls Filing of Cost Bills. See COSTS, 1.

When Judgment of Supreme Court is "Rendered." See APPEAL, 19.

Limitation of Time to File Cost Bills. See COSTS, 2.

SURPLUSAGE in Criminal Charges. See INDICT. & INFORM. 1.

TACKING Debts to Security. See CHATTEL MORTGAGES, 3.

TAXATION.

PRESUMED PAYMENT TO PRINCIPAL OF RECEIPTS BY DEPUTIES.

1. Where it appears that deputy tax collectors placed their collections with the other funds of the office, it will be presumed, even in a criminal case for embezzlement, that such funds came into the hands of the principal, and in a settlement of his accounts he should be charged therewith. *State v. Neilson*, 108.

PRESUMPTION AS TO MONEY PAID FOR TAXES BY CHECK.

2. Under a statute requiring taxes to be paid in current gold and silver coin of the United States, and requiring tax collectors to give receipts for taxes so paid "as cash," it will be presumed, in the absence of a contrary showing, that the tax collector cashed drafts, checks, or money orders which he received for taxes in lieu of coin, and hence such drafts, etc., are properly chargeable to him in balancing his official account. *State v. Neilson*, 108.

PRECEDENCE BETWEEN TAX LIEN AND PRIOR MORTGAGE.

3. Under Section 2321 of Hill's Ann. Laws, providing that "a sale of real property conveys to the purchaser all the estate or interest therein of the owner," and section 2323, providing that a tax deed should operate "to convey a legal and equitable title to the purchaser [property?], sold in fee-simple to the grantee named in such deed," a tax deed did not cut off the lien of a mortgage executed before the assessment and levy of the tax, the assessment being against the person, and not specifically against the property, and the manner of collecting the tax being to make it out of the personal property, if such could be found, and, if not, then out of the realty. Under this statute only the interest of the person assessed passed by the deed. *Middleton v. Moore*, 357; *Ferguson v. Kaboth*, 414.

EFFECT OF ACT CURING DEFECTIVE TAX PROCEEDINGS.

4. Section 5 of the act of 1901, relating to the purchase and sale by county judges and school clerks of land sold for taxes (B. & C. Comp. § 3135), does not make valid void tax proceedings, for no legislature can validate a void proceeding, though it may retrospectively cure irregularities or imperfections not vital. For example, where a sale for unpaid taxes is entirely void and of no effect, a subsequent act purporting to declare a deed by the purchaser at such sale conclusive as to the validity of the tax proceedings is ineffectual to accomplish its purpose, as it is an attempt to transfer by legislative act the title of the original holder to the vendee of the tax-sale purchaser, and that no legislature can do.

Ferguson v. Kaboth, 414.

LIABILITY OF GRANTEE OF LAND FOR TAXES.

5. Section 2846 of Hill's Ann. Laws, providing that as between the grantor and grantee of land, when there is no express agreement as to which shall pay taxes assessed before the conveyance, if the land is conveyed at the time of or prior to

the date of the warrant authorizing the collection of such taxes the grantee shall pay the same, and if conveyed after that date the grantor shall pay them, does not impose a duty on the grantee of land to pay taxes assessed thereon at the time of his purchase but not yet payable. It was designed to give the grantor of land conveyed between the time of the assessment of taxes and the date of the warrant for their collection a right to recover from his grantee the amount of such taxes, if the former was obliged to pay them, in the absence of an express agreement.

Ferguson v. Kaboth, 114.

TENDER OF TAXES BY CLAIMANT AGAINST TAX PURCHASER.

6. Under Sections 8124 and 8135, B. & C. Comp., requiring one seeking to quiet his title against a tax deed to first pay into court the amount of taxes and costs for which the premises were sold at the tax sale, together with certain other sums, does not apply to a case where the tax sale is void because of a wrong assessment, for in such a case the plaintiff is claiming by a title paramount to and unaffected by the tax proceeding, and cannot be considered as seeking to quiet his title against such sale.

Ferguson v. Kaboth, 414.

AMENDMENT OF TAXATION SCHEME.

7. B. & C. Comp. §§ 3057, 3120, providing that the assessment for taxes shall begin on the first Monday in March, and setting forth the dates for all acts in reference thereto, are amended by Laws 1903, p. 293, setting them out in full as amended, and substituting an entire change of dates, making the assessment begin on the first Monday in January, etc., and providing that the new law shall go into force January 1, 1904. *Held*, that such amendment operated as an entire repeal of the former statutes, and, on the taking effect of the new law, no further proceedings could be had under the old, though the effect was to leave officials without authority to estimate and apportion the necessary tax for that year.

Flanders v. Multnomah County, 583.

See, also, EMBEZZLEMENT and MORTGAGES.

TAX DEEDS.

Relative Position of Mortgages and Tax Deeds. See TAXATION, 3.

TAXING COSTS. See COSTS.

TENDER of Tax. See TAXATION, 6.

TERM OF COURT.

Power to Vacate Order After Close of Term. See JUDGMENTS, 4.

TITLE OF ACT. See STATUTES, 1.

TRANSCRIPTS.

Effect of Not Paying Filing Fee in Supreme Court. See APPEAL, 5.

TRESPASS.

INJUNCTION — IRREPARABLE DAMAGE NECESSARY.

1. An Injunction will not lie to restrain a mere trespass on property, for equity interferes in such cases only when the damage being done is irreparable.

Moore v. Halliday, 243.

INSOLVENCY OF TRESPASSER NOT GROUND FOR INJUNCTION.

2. There must be some further reason for equitable interference than a mere trespass by an insolvent trespasser.

Moore v. Halliday, 243.

TRIAL.

CONDUCT OF TRIAL — REMARKS BY JUDGE.

1. Statements made by a trial judge during an argument by counsel on a proposition of law, illustrating a hypothetical case, and accompanied by such a statement as, "I think that is the law; I do not intimate that the defendant did any of those things, that is for the jury to determine," is not an invasion of the

province of the jury, or an expression of opinion as to the facts in issue, or the weight of evidence. *State v. Humphreys*, 44.

TAKING CASE FROM JURY.

2. The testimony offered by the plaintiff justified a submission of the case to the jury, for it reasonably tended to support the allegations of the complaint.

Manary v. Runyon, 495.

FORM OF INSTRUCTIONS—NECESSITY OF WRITING.

3. In Oregon the rule requiring a trial judge to reduce his charge to writing, if requested to do so, and to file it with the clerk (B. & C. Comp. § 132, subd. 6), which is generally held to be mandatory, is modified by Section 1484, B. & C. Comp., providing that the supreme court shall give judgment without regard to technical errors which do not affect the substantial rights of the parties, so that the failure of a trial judge to write out certain passages from a printed book will not require a reversal, where the extracts were read without comment, and were substantially the same as the written instructions. The failure of the judge to write down the entire charge and file it was a technical but not a material error, it being manifest that the passages read did not modify or change the written charge.

State v. Armstrong, 207.

CHARGE TO JURY MUST BE CONSIDERED IN ITS ENTIRETY.

4. In passing upon the correctness of a single instruction or a part of a charge to a jury mere verbal slips should be disregarded, and the charge weighed as a whole.

Scott v. Astoria Railroad Co. 26.

CONFLICTING INSTRUCTIONS AS ERROR.

5. The giving of directly contradictory instructions on a vital question in a case constitutes reversible error, for a charge of that kind cannot be construed into a harmonious and correct statement of the law involved. For example, a charge that unless the necessity for taking life is actual, present, and urgent, a defendant cannot invoke the doctrine of self-defense, is entirely inconsistent with an instruction that defendant has a right to act on appearances if he acts in good faith, and the jury cannot get from such a charge a correct idea of the rights of the defendant.

State v. Miller, 325.

APPLICABILITY OF INSTRUCTIONS TO CASE.

6. Abstract propositions of law should not be stated to a jury under the guise of instructions, but the propositions should be applied to the facts in hand; thus, in an action for the price of sundry chattels, where a rescission was not pleaded, the court properly refused to give requested instructions stating merely the law on the right of rescission.

Steiger v. Fronhofer, 178.

IDEM.

7. Instructions stating correct propositions of law but not appropriate to the evidence in the case should not be given, as they tend to confuse the minds of the jury.

State v. Miller, 325; *Williamson v. North Pac. Lum. Co.* 337.

IDEM.

8. Under a statute allowing evidence by oral examination or deposition the refusal of a requested charge that the fact that a witness testifies by deposition does not affect his credibility is not error, where there are no peculiar circumstances attending the introduction of depositions which call for such a charge.

Williamson v. North Pac. Lum. Co. 337.

IDEM.

9. The exclusion as irrelevant of evidence as to a matter not in controversy, and the refusal of a request to charge that this matter was not in controversy, are not erroneous, as inconsistent.

Williamson v. North Pac. Lum. Co. 337.

REQUESTED INSTRUCTIONS MUST BE CORRECT AND APPROPRIATE.

10. A judge may properly refuse to give requested instructions that ignore part of the testimony.

State v. Deal, 17.

IDEM.

11. A court may properly refuse requested instructions to a jury where they are not correct expositions of the law as applied to the theory adopted by the party presenting them, and the court does not thereby refuse to present the theory of the party desiring the instructions. *Stute v. Smith*, 109.

IDEM.

12. In an action on a promissory note, the execution of which is denied, defendant pleading that the signature is a forgery, an instruction that it will be presumed that the person who signed the note, if not defendant, was innocent of forgery, is of doubtful propriety. *Sears v. Daly*, 346.

OPERATION—INCONSISTENT INSTRUCTION MAY BE REFUSED.

13. In an action on a note, where defendant alleged that the signature of her name thereto was a forgery, an erroneous instruction that the presumption was that the note was regularly executed was not cured by a previous instruction to the effect that the burden of proof was on plaintiff to show that defendant executed the note, as it was impossible to tell which instruction the jury followed. *Sears v. Daly*, 346.

TROVER AND CONVERSION.

NECESSARY ELEMENTS OF CONVERSION.

1. To constitute a conversion it must appear that the person charged has exercised some act of dominion or control over the property of another inconsistent with the latter's rights, or has aided or assisted some one else to do so.

Walker v. First Nat. Bank, 102.

ACCEPTING PROCEEDS OF ANOTHER'S PROPERTY NOT A CONVERSION.

2. The acceptance by a creditor of money in payment of a debt, not knowing that it did not belong to the debtor, is not a conversion by such creditor of the money, though it might be otherwise if he had received possession of property that the debtor did not own.

Walker v. First Nat. Bank, 102.

EXAMPLE OF CONDUCT NOT CONSTITUTING A CONVERSION.

3. A bank cannot be held liable for conversion by a flouring mill company in manufacturing flour from wheat belonging to plaintiff, and selling the same, by receiving in good faith, and without knowledge of plaintiff's rights, a draft drawn on the purchaser for collection, together with a bill of lading for the flour, and after making collection, disbursing the proceeds. *Walker v. First Nat. Bank*, 102.

TRUSTS AND TRUSTEES.

CREATION AND VALIDITY—EVIDENCE.

1. The evidence satisfies the court that the transfer questioned in this suit was made to the defendant as a trustee for plaintiff. *Martin v. Martin*, 119.

MANAGEMENT—CHANGING TRUSTEE WITH INTEREST.

2. A trustee is not chargeable with interest on trust funds in his hands unless he has been negligent or unfaithful to his duty. *Martin v. Martin*, 119.

PAROL EVIDENCE OF TRUST IN PERSONAL PROPERTY—VARYING WRITING.

3. Parol evidence is competent to show that a transfer of personal property by a bill of sale absolute in form was in trust for the assignor. *Martin v. Martin*, 119.

UNDERTAKING.

Right to File an Omitted Necessary Undertaking After Appealing to the Circuit Court. See JUSTICES OF THE PEACE, 4.

UNITED STATES STATUTES. Same as STATUTES OF THE UNITED STATES.

UNITED STATES WEATHER BUREAU.

Records of—When are Competent to Show Rainfall, etc.—Synopsis of Entries by Previous Officers. See EVIDENCE, 9, 10.

VACATION of Public Roads. See HIGHWAYS, 9-14.

VARIANCE Between Notice and Petition. See HIGHWAYS, 10.

VENDOR AND PURCHASER.

VALIDITY OF CONTRACT—RIGHT TO FORFEIT.

1. A provision in a contract for the sale of realty, giving the vendor the right of forfeiture upon default in a stipulated condition to be performed by the vendee, is valid and enforceable. *Graham v. Merchant*, 294.

CONSTRUCTION OF CONTRACT—SEVERABILITY.

2. A contract to convey for a fixed total sum certain specified real and chattel property, together with the land covered by a homestead entry on which final proof had not been made, is an entire indivisible contract, enforceable only as a whole, and as it is void, being against public policy, it is not enforceable at all.

Horseman v. Horseman, 88.

IDEM.

3. A contract between a husband and his wife by which, on payment to him by her of a stated sum of money, they were to divide their respective lands so that neither should thereafter have any interest or right in any land of the other is entire and indivisible. Such a contract cannot be enforced in any particular, since it is indivisible, and is void as to the interests to be transferred.

Potter v. Potter, 149.

PERFORMANCE OF CONTRACT—WAIVER OF PAYMENT.

4. Where a contract for the sale of land provided for the payment of the purchase price in installments, and stipulated that, if any installment should not be paid when due, the vendor might take possession of the land, and declare forfeited all payments which had been made, the acceptance of a payment by the vendor after the vendee was in default was an election to consider the contract still in force.

Graham v. Merchant, 294.

RIGHTS OF PARTIES AS TO EACH OTHER—NOTICE OF FORFEITURE.

5. A right to declare a forfeiture of a contract is one that must be affirmatively exercised by the person reserving it. Under such a contract, while the vendee is in default under a waiver of the right to declare a forfeiture, the vendor cannot forfeit except after notice and after allowing the vendee a reasonable time within which to comply with the terms of the contract.

Graham v. Merchant, 294.

RIGHTS OF PARTIES—ASSIGNEE OF BOND FOR DEED.

6. In a suit by the obligee in a bond for the conveyance of real estate to compel specific performance, evidence held insufficient to show either a transfer of the bond by plaintiff or a ratification of an unauthorized assignment of it in her name by her husband.

Hawley v. Hawley, 352.

RIGHTS OF BONA FIDE PURCHASERS—RECORDS.

7. Under Section 5350 of B. & C. Comp., providing that every conveyance of real property not recorded within five days shall be void as against subsequent purchasers in good faith whose conveyance shall be first recorded, where neither purchaser records within the time limited, the one whose conveyance is first recorded acquires the better title.

McLeod v. Lloyd, 200.

RIGHTS OF BONA FIDE PURCHASERS—POSSESSION BY ANOTHER.

8. A purchaser of real property finding a person other than the vendor in possession is bound at his peril to inquire with reasonable care as to the rights of such occupant, and is chargeable with whatever facts would be disclosed by such an inquiry.

Hawley v. Hawley, 352.

EFFECT OF NOT INQUIRY OF STRANGER IN POSSESSION.

9. A purchaser of property, failing to make inquiry of a stranger in possession, is in law chargeable with bad faith, and cannot claim the rights of a bona fide purchaser.

Randall v. Lingwall, 383.

IDEM.

10. A purchaser from one apparently holding the legal title, who has not made any inquiry of the tenant in possession, is not in a position to urge that the inquiry, if made, would probably not have disclosed the rights of equitable claimants. *Randall v. Lingwall*, 383.

RULE WHERE GRANTOR RETAINS POSSESSION.

11. The rule that the continued possession of land by the grantor in a conveyance thereof is not notice to a *bona fide* purchaser from the grantee of any rights of such grantor, is not applicable where such grantor has not personally retained possession. *Randall v. Lingwall*, 383.

POSSESSION OF TENANT AS NOTICE.

12. The possession of a tenant of real property is of itself sufficient to put an intending purchaser from a third person upon inquiry as to the landlord's title, and to charge him with constructive notice of such facts as might have been discovered by reasonable diligence. *Randall v. Lingwall*, 383.

EVIDENCE AS TO EXISTENCE OF TENANCY.

13. Decedent deeded land to his brother, who later reconveyed to decedent. The latter deed was not recorded, but decedent took possession, and later leased the land to a third person. The tenant paid the rent to decedent until the latter's death, after which the brother, having learned that his deed to decedent was not of record, notified the tenant that he owned the land, and demanded payment of rent, which the tenant accordingly paid to him for two months in order to avoid controversy, and without informing the decedent's representatives. *Held*, that the tenant still remained tenant of decedent, so that his possession was sufficient to put an intending purchaser of the property on inquiry as to decedent's rights. *Randall v. Lingwall*, 383.

RECOVERY OF PURCHASE MONEY—PROCEEDINGS.

14. In an action by the vendee to recover payments made on a contract for the sale of land, providing that, in case the vendee should make default in the payment of any of the installments of the purchase price, the vendor might declare forfeited the payments previously made, and reënter on the land, it was admitted that the last payment was not made when it was due, the vendee alleging the making of an oral contract for an extension of time. The vendor requested an instruction that the burden was on plaintiff to prove by the preponderance of the evidence that such agreement had been entered into, and that, unless the jury so found, their verdict should be for the vendor. *Held*, that this request was included in a charge that the burden was on plaintiff to prove the allegations of the complaint, and to prove by a preponderance of the evidence that a parol contract had been entered into as alleged, and that if the vendee made default, and while such default continued the vendor demanded payment, and retook possession of the premises and exercised control over them, the vendee could not recover.

Graham v. Merchant, 204.

INSTRUCTION WITHIN ISSUES OF PLEADINGS—RESCISSION BY VENDOR.

15. A contract for the sale of land stipulated for the payment of the purchase price by installments, and provided that, if default should be made in the payment of any installment, the vendor might reënter, and declare forfeited the installments paid. After a reëntry by the vendor, the vendee sued to recover the installments which he had paid. The plaintiff alleged that after the time of default he made a payment on the land, which was accepted under the contract. The defendant denied this, but admitted that after default he had received a certain amount in stumpage on logs cut and removed from the land. Plaintiff claimed this money was received as a payment on the land. *Held*, that an instruction that defendant's entry on the land was wrongful, if the jury found that payments had been accepted by him after plaintiff was in default, was within the issues. *Graham v. Merchant*, 204.

IDEM.

16. Under such conditions an instruction that the vendor's reentry was wrongful if the time for completing the payments had been extended beyond the time of such reentry was within the issues made by the pleadings.

Graham v. Merchant, 294.

IDEM.

17. Under such conditions an instruction that the right of the vendor to reenter and declare a forfeiture without notice was waived if, after default, the parties had dealt with the land in a manner inconsistent with the theory of a previous forfeiture was proper.

Graham v. Merchant, 294.

IDEM.

18. Under such conditions, it appearing that after the default, but during the extension of time alleged by the vendee to have been made, the vendor cut and removed from the land a large quantity of timber, a charge that the vendor's reentry was wrongful, if he had refused to account for moneys which should have been credited to the vendee was proper.

Graham v. Merchant, 294.

VENUE.**CHANGING PLACE OF TRIAL — DISCRETION OF COURT.**

The right to change the venue of a trial is one confided by statute to the discretion of the trial judge, to be carefully exercised to the end that all interested parties may be justly treated, and this discretion will not be reviewed unless it appears that an injustice has resulted. In these cases it does not so appear.

State v. Humphreys, 44; State v. Armstrong, 207.

VERDICT.

Effect of In Curing Defective Statements. See **PLEADING, 9.**

Interest not Allowable as an Item. See **REPLEVIN, 5.**

WAIVER

Of Indefiniteness by Pleading Over. See **PLEADING, 1, 9-14.**

WAREHOUSEMEN.**LARCENY BY BAILEE — STATUTES.**

1. A warehouseman who gives to a depositor receipts not in the form prescribed by Hill's Ann. Laws, §§ 4201-4207, regulating warehousemen, may be prosecuted for a conversion of the bailed property under section 1771, defining and punishing larceny by bailee, instead of under the special provisions regulating warehousemen.

State v. Humphreys, 44.

WAREHOUSE CONTRACT — SALE — BAILMENT.

2. In a case where a mortgagee under an agreement to pay storage, but with the expectation of selling it to the best purchaser, is a bailment and not a sale, though the depositor was willing to take the market price in cash rather than the property, if the warehouseman should prefer that method of settlement upon a demand being made for the property.

State v. Humphreys, 44.

WARRANTY.

Implication of Authority by Executing Contract. See **PRIN. & AGENT, 4.**

Action of Damages for Breach — Form of. See **PRIN. & AGENT, 5.**

WASTE.**INJUNCTION AGAINST WASTE BY MORTGAGOR IN POSSESSION.**

1. A mortgagee of land may maintain a suit to restrain waste by the mortgagor that will impair the value of the property as security for the debt.

Beaver Lumber Co. v. Eccles, 400.

WASTE BY MORTGAGOR — BOND OF INDEMNITY.

2. In a case where a mortgagor should be enjoined from continuing waste on the mortgaged property, defendant ought not to be permitted to continue his destruction upon filing a satisfactory bond, either for the payment of the debt when due, or to indemnify plaintiff for such damages as he may suffer by the diminution of the security.

Beaver Lumber Co. v. Eccles, 400.

WEATHER BUREAU.

Records of as Evidence — Summary of Official Records Kept by Successive Previous Officers. See EVIDENCE, 16.

WIDOW.

Effect of Administrator's Sale on Dower. See EXECUTORS, 2.

Not a Party to Proceedings by an Administrator Asking Sale of Husband's Realty to Pay Debts. See EXECUTORS, 4.

WILLS.**PROBATING — NOTICE OF CONTEST.**

1. A petition contesting a will, which alleges that the paper admitted to probate as the will of decedent was not decedent's will; "that the same was not signed by her, nor was the same witnessed as by law required, or witnessed at all, in fact; that said paper was never executed as or for a will, and was never intended by said decedent to be her last will"—is sufficient to raise the question whether decedent subscribed the instrument or acknowledged its execution in the presence of the subscribing witnesses, especially where the proponent, in his answer, avers that decedent signed the will in the presence of the witnesses, to whom she thus declared the same to be her will, and that the witnesses, in the presence of the testatrix, at her request, and in the presence of each other, signed as witnesses.

Mendenhall's Will, 542.

PETITION FOR CONTEST OF WILL — NECESSARY ALLEGATIONS.

2. The allegations of a notice of contest of a will must be sufficiently broad and specific to call in question the validity of the will or the competency or sufficiency of the proof of its execution, and should point out with reasonable accuracy the specific points on which reliance will be placed to set aside the probate.

Mendenhall's Will, 542.

EVIDENCE — EFFECT OF RECITALS IN ATTESTATION CLAUSE.

3. Where the memory of witnesses to a will is at fault in establishing the incidents attending the formal execution thereof, the attestation clause comes to the support of its validity, and the law will presume a due execution from the recitals therein of the requisite facts, but such recital cannot prevail against positive and convincing proof to the contrary.

Mendenhall's Will, 542.

BURDEN OF PROOF IN PROBATING WILLS.

4. Where the validity of a will is attacked by a direct proceeding after probate in common form, or on *ex parte* proceedings, the person seeking to maintain the validity of the will has the burden of proving every essential fact, not admitted or waived by the pleadings, necessary to authorize probate in the county court.

Mendenhall's Will, 542.

SUFFICIENCY OF EVIDENCE OF EXECUTION OF WILL.

5. The evidence herein shows that decedent neither signed the will in question nor acknowledged its execution in the presence of subscribing witnesses.

Mendenhall's Will, 542.

WITNESSES.**EXAMPLE OF PROPER CROSS-EXAMINATION.**

1. A witness having testified that the name of a stated person had been signed to certain papers by some of his employes, it is within the limits of proper cross-examination to ask the witness if such employes did not have authority to sign the name of their employer as they had done.

State v. Humphreys, 44.

IDEM.

2. On a prosecution for a felonious assault, the prosecuting witness having testified on cross-examination that he had had some difficulty with defendant over some mining claims, it was not error to exclude a question as to whether he had made some relocations whereby the defendant had been left out, for even if

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he had been unlawfully excluded from some rights, it was no justification for the assault, and the answer might have tended to confuse the minds of the jurymen.

State v. McCann, 155.

IDEM. BROWBEATING A WITNESS.

3. Cross-examination that does not elicit material information and tends to humiliate or bully a witness should not be permitted.

State v. Miller, 325.

CROSS EXAMINATION OF ACCUSED.

4. Under Section 1400, B. & C. Comp., permitting a defendant to be cross-examined on all matters to which he has testified in chief, tending to his conviction or acquittal, the accused may be asked about matters tending to illustrate or explain the feelings of the parties toward each other, such as the ordering of defendant off his premises by deceased.

State v. Miller, 325.

INTEREST OF WITNESS — FOUNDATION FOR IMPEACHMENT.

5. Though a prosecuting witness had testified in chief that he was not armed with a pocketknife, it was not error to exclude a question asked him on cross-examination as to whether he had afterward made statements as to what he would have done had he had a gun instead of a knife, as such question was not broad enough to lay a foundation for his impeachment on that subject.

State v. McCann, 155.

UNDERSTANDING OF IMPEACHING QUESTION BY WITNESS.

6. An impeaching question is sufficient if it attracts the attention of witness to the particular statement or act about which he is being asked, and greater particularity than will accomplish this is not required.

State v. Gray, 446.

COMPETENCY OF IMPEACHING EVIDENCE.

7. Statements made by a witness after an occurrence as to what he would have done at the time had he been armed with a gun, are not competent, since they do not tend to explain the occurrence, or to show the motives or feelings of the witness.

State v. McCann, 155.

IDEM.

8. On cross-examination of a witness she was asked if, under given circumstances, she had not made a certain statement to a certain person, which she denied. The certain person, having been asked whether such statement had been made, answered "Yes, would answer part of that," but, after being required to answer explicitly, said "Yes." On cross-examination she explained the conversation, which differed materially from the version given by the first witness, yet contradicted it in some respects. *Held*, that the impeaching testimony was competent.

State v. Gray, 446.

EXPLAINING CONTRADICTORY STATEMENTS.

9. Where an affidavit concerning the falsity of his testimony in another trial is produced on his cross-examination to impeach a witness, he may relate a conversation with a third person, who importuned him to make the affidavit, and state the contents of a threatening note which he had previously received, and which was referred to in the conversation, to explain the circumstances under which the impeaching affidavit was made.

State v. Howard, 166.

WORDS AND PHRASES.

"DWELLING HOUSE."

The term "dwelling house," used in B. & C. Comp. § 56, subd. 5, signifies domicile with the idea of permanence.

McFarlane v. Cornellius, 513.

"PLACE OF RESIDENCE."

The expression "place of residence," used in B. & C. Comp. § 57, line 8, means the place where the defendant is at the time of the mailing of the summons and complaint, without reference to how long he may have been there or will probably remain.

McFarlane v. Cornellius, 513.

"RENDERED."

A judgment or decree is "rendered," within the meaning of Section 568, B. & C. Comp., when the opinion of the court is officially made public.

McFarlane v. McFarlane, 477.

"RESIDENCE."

A defendant's "residence," for the purpose of publishing the summons, is the place where he may be found at the time the summons is mailed, the purpose of the publication being to notify the defendant of the pendency of the proceeding.

McFarlane v. Cornelius, 518.

"TRANSCRIPT."

The word "transcript," as used in Section 553, B. & C. Comp., means a fair synopsis of the proceedings in the trial court relative to the questions reserved by appellant for further consideration. It must be correct as to the matters involved, and sufficiently complete not to be misleading; but it need not present the record as to matters relied upon by the respondent, the latter being protected by the right to ask for an additional record, under section 554. *Backhaus v. Buells*, 558.

"USUAL PLACE OF ABODE."

The term "usual place of abode," as used in B. & C. Comp. § 55, subd. 5, is synonymous with dwelling house, used in the same section, and means the place of permanent dwelling in this state.

McFarlane v. Cornelius, 518.

WRIT OF REVIEW.**TO WHOM WRIT IS DIRECTED.**

1. Under B. & C. Comp. § 500, providing that a writ of review shall be directed to the court, officer or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having custody of its records or proceedings, a writ to review the action of the county court in vacating a road is properly directed to the county clerk, whose duty it is, under B. & C. Comp. § 1008, to keep the records, files, and other books and papers appertaining to said court.

Fisher v. Union County, 228.

PETITION FOR WRIT—SPECIFICATION OF ERRORS.

2. Under B. & C. Comp. § 506, providing that a petition for a writ of review must describe with sufficient certainty the decision of the inferior court and the errors alleged to have been committed therein, a petition for a review of the action of a county court in vacating a road, alleging that the road described in the notice of application for vacation posted in the courthouse was not the same road specified in the petition for vacation, is a sufficient averment of fact to support the deduction that the county court erred in not dismissing the proceedings to vacate the road for want of jurisdiction, and hence is sufficient.

Fisher v. Union County, 228.

See, also, **HIGHWAYS.**

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VACATION of Public Roads. See HIGHWAYS, 9-14.

VARIANCE Between Notice and Petition. See HIGHWAYS, 10.

VENDOR AND PURCHASER.

VALIDITY OF CONTRACT—RIGHT TO FORFEIT.

1. A provision in a contract for the sale of realty, giving the vendor the right of forfeiture upon default in a stipulated condition to be performed by the vendee, is valid and enforceable. *Graham v. Merchant*, 294.

CONSTRUCTION OF CONTRACT—SEVERABILITY.

2. A contract to convey for a fixed total sum certain specified real and chattel property, together with the land covered by a homestead entry on which final proof had not been made, is an entire indivisible contract, enforceable only as a whole, and as it is void, being against public policy, it is not enforceable at all. *Horseman v. Horseman*, 88.

IDEM.

3. A contract between a husband and his wife by which, on payment to him by her of a stated sum of money, they were to divide their respective lands so that neither should thereafter have any interest or right in any land of the other is entire and indivisible. Such a contract cannot be enforced in any particular, since it is indivisible, and is void as to the interests to be transferred. *Potter v. Potter*, 149.

PERFORMANCE OF CONTRACT—WAIVER OF PAYMENT.

4. Where a contract for the sale of land provided for the payment of the purchase price in installments, and stipulated that, if any installment should not be paid when due, the vendor might take possession of the land, and declare forfeited all payments which had been made, the acceptance of a payment by the vendor after the vendee was in default was an election to consider the contract still in force. *Graham v. Merchant*, 294.

RIGHTS OF PARTIES AS TO EACH OTHER—NOTICE OF FORFEITURE.

5. A right to declare a forfeiture of a contract is one that must be affirmatively exercised by the person reserving it. Under such a contract, while the vendee is in default under a waiver of the right to declare a forfeiture, the vendor cannot forfeit except after notice and after allowing the vendee a reasonable time within which to comply with the terms of the contract. *Graham v. Merchant*, 294.

RIGHTS OF PARTIES—ASSIGNEE OF BOND FOR DEED.

6. In a suit by the obligee in a bond for the conveyance of real estate to compel specific performance, evidence held insufficient to show either a transfer of the bond by plaintiff or a ratification of an unauthorized assignment of it in her name by her husband. *Hawley v. Hawley*, 352.

RIGHTS OF BONA FIDE PURCHASERS—RECORDS.

7. Under Section 5859 of B. & C. Comp., providing that every conveyance of real property not recorded within five days shall be void as against subsequent purchasers in good faith whose conveyance shall be first recorded, where neither purchaser records within the time limited, the one whose conveyance is first recorded acquires the better title. *McLeod v. Lloyd*, 260.

RIGHTS OF BONA FIDE PURCHASERS—POSSESSION BY ANOTHER.

8. A purchaser of real property finding a person other than the vendor in possession is bound at his peril to inquire with reasonable care as to the rights of such occupant, and is chargeable with whatever facts would be disclosed by such an inquiry. *Hawley v. Hawley*, 352.

EFFECT OF NOT INQUIRING OF STRANGER IN POSSESSION.

9. A purchaser of property, failing to make inquiry of a stranger in possession, is in law chargeable with bad faith, and cannot claim the rights of a bona fide purchaser. *Randall v. Lingwall*, 883.

IDEM.

10. A purchaser from one apparently holding the legal title, who has not made any inquiry of the tenant in possession, is not in a position to urge that the inquiry, if made, would probably not have disclosed the rights of equitable claimants. *Randall v. Lingwall*, 383.

RULE WHERE GRANTOR RETAINS POSSESSION.

11. The rule that the continued possession of land by the grantor in a conveyance thereof is not notice to a *bona fide* purchaser from the grantee of any rights of such grantor, is not applicable where such grantor has not personally retained possession. *Randall v. Lingwall*, 383.

POSSESSION OF TENANT AS NOTICE.

12. The possession of a tenant of real property is of itself sufficient to put an intending purchaser from a third person upon inquiry as to the landlord's title, and to charge him with constructive notice of such facts as might have been discovered by reasonable diligence. *Randall v. Lingwall*, 383.

EVIDENCE AS TO EXISTENCE OF TENANCY.

13. Decedent deeded land to his brother, who later reconveyed to decedent. The latter deed was not recorded, but decedent took possession, and later leased the land to a third person. The tenant paid the rent to decedent until the latter's death, after which the brother, having learned that his deed to decedent was not of record, notified the tenant that he owned the land, and demanded payment of rent, which the tenant accordingly paid to him for two months in order to avoid controversy, and without informing the decedent's representatives. *Held*, that the tenant still remained tenant of decedent, so that his possession was sufficient to put an intending purchaser of the property on inquiry as to decedent's rights. *Randall v. Lingwall*, 383.

RECOVERY OF PURCHASE MONEY—PROCEEDINGS.

14. In an action by the vendee to recover payments made on a contract for the sale of land, providing that, in case the vendee should make default in the payment of any of the installments of the purchase price, the vendor might declare forfeited the payments previously made, and reënter on the land, it was admitted that the last payment was not made when it was due, the vendee alleging the making of an oral contract for an extension of time. The vendor requested an instruction that the burden was on plaintiff to prove by the preponderance of the evidence that such agreement had been entered into, and that, unless the jury so found, their verdict should be for the vendor. *Held*, that this request was included in a charge that the burden was on plaintiff to prove the allegations of the complaint, and to prove by a preponderance of the evidence that a parol contract had been entered into as alleged, and that if the vendee made default, and while such default continued the vendor demanded payment, and retook possession of the premises and exercised control over them, the vendee could not recover.

Graham v. Merchant, 294.

INSTRUCTION WITHIN ISSUES OF PLEADINGS—RESCISSION BY VENDOR.

15. A contract for the sale of land stipulated for the payment of the purchase price by installments, and provided that, if default should be made in the payment of any installment, the vendor might reënter, and declare forfeited the installments paid. After a reëntry by the vendor, the vendee sued to recover the installments which he had paid. The plaintiff alleged that after the time of default he made a payment on the land, which was accepted under the contract. The defendant denied this, but admitted that after default he had received a certain amount in stumpage on logs cut and removed from the land. Plaintiff claimed this money was received as a payment on the land. *Held*, that an instruction that defendant's entry on the land was wrongful, if the jury found that payments had been accepted by him after plaintiff was in default, was within the issues. *Graham v. Merchant*, 294.